

**RETROSPECTIVITY AT NUREMBERG:
THE NATURE AND LIMITS OF A SCHMITTIAN ANALYSIS**

By

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<u>VOLUME II</u>	
<u>CHAPTER 3 - CARL SCHMITT IN CONTEXT AND THE SCHMITTIAN SKEIN</u>	1
The protagonists in profile	2
The scene is set	6
The search for a system	14
A personal sketch	17
A blighted Constitution and the death of a Republic	21
The German positivist tradition and Schmitt's early ventures into the realm of legal and political theory	29
The enigma of Thomas Hobbes (1588-1679): a political theorist belonging <i>de facto</i> to the history of the natural law tradition and <i>de jure</i> to the history of legal positivism	39
An overview	39
A life in the shadow of turmoil	43
<i>Leviathan</i> : averting an apocalypse: negating the state of nature and the 'laws of nature'	45
Man's covenant with Man and the creation of the Commonwealth	52
Reciprocity within the Commonwealth: obedience and protection	55
The sovereign makes the 'law'?	59
Individual rights: enforceable or spectral?	66
Within the Leviathine labyrinth: a discourse between sovereign's representative (R) and subject (S)	66
The lingering enigma	74
Handing over the baton	75
The Schmittian skein	75
The analytical challenge	75
The 'why': the iron and golden threads	78
The iron thread unchained	80
The first glistenings of the golden thread	83
Elucidation of the golden thread: Article 48 under scrutiny	86
Dictatorship dissected: commissarial and sovereign dictatorship – the 'what' and the 'how long'	90
The exception, sovereignty and the decision: the 'when', the 'who' and the 'how'	105
The 'when': the exception	105
The 'who': sovereignty	110
The 'how': the decision	113
The 'where': the 'political'	126
The 'whom': the role of the individual within a communitarian setting	136
The individual within the political	136
The individual and the state	139
The individual within Schmitt's re-formulation of the Hobbesian reciprocity between obedience and protection	151
Hobbesian obedience	152
Hobbesian protection	152
Schmittian obedience	153
Schmitt: protection or dominion?	156
The 'whence': the will of the people and the democratic concept of law	168
Revamping decisionism: is not the die yet cast?	168
The backdrop	169

The early years: distrust of ‘the people’	172
A paradox too far: grasping the ‘people’s will’	178
Homogeneity invoked	178
Homogeneity and immanence	178
Homogeneity and transcendence	183
The temporal sequence	184
God as the foundation for the legal order	186
The normativist ‘solution’	187
The Hobbesian social contract theory - a covenant between individuals as the foundation of the state	189
Viability of sublimation of the ‘will of the people’	193
The <i>pouvoir constitue</i> and the reconceptualisation of <i>representation</i> and <i>identification</i>	194
Instrumentalisation of the <i>pouvoir constituant</i>	201
The positive concept of the constitution and Article 48	205
The people’s will in decline	211
‘The wherefore’: the apogee of Schmitt’s anti-liberal invective	214
Introduction	214
Who guards the constitution?	215
The golden thread made perfect	217
The links within the iron thread interlocked	220
The iron thread fully forged	223
Exemplification of the iron thread: the principle of ‘equal chance’	230
Consummation of the Weimar skein	237
The way forward	241

CHAPTER 3

CARL SCHMITT IN CONTEXT AND THE SCHMITTIAN SKEIN

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The protagonists in profile

Explored in the foregoing chapter was the highly-charged contest for supremacy between the differing jurisprudential traditions embedded within the Nuremberg proceedings. As discussed, nowhere did this natural law/positivist chasm emerge more tellingly than in the specific context of the imputations of retrospectivity pervading the Trial. Numerous devices are doubtless available to assess the validity of retroactively-deployed criminal law. But how illuminating might it prove to conduct such exercise through the lens of Carl Schmitt (1888-1985), German Catholic Conservative political theorist and self-vaunted decisionist¹ - an intellectual whose prolific body of work chiefly emerged against the backdrop of two World Wars and the internecine turmoil of Weimar Germany. Together with his professed inspirational model, English philosopher Thomas Hobbes (1588-1679), seminal advocate of the authoritarian State, where '*he who carries the power is sovereign and everyone besides the subject*',² both may lay claim, however controversially, to the epithet of great legal and political theorists of their respective ages.

Schmitt is not readily typified for, with fluctuating degrees of consistency and intensity, he sporadically disclaims specific adherence to variants of either a positivist or natural law position. Instead, he appears to favour a peculiar brand of communitarian existentialism³ where sovereign power is exercised in a non-teleological moral vacuum:⁴

¹ See Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Massachusetts: MIT Press, 1985) translated by George Schwab from *Politische Theologie*, 1922 (Berlin: Duncker & Humblot, 1934) for a detailed discussion of Schmitt's theory of decisionism. Throughout this volume and thesis, where short quotations from published works appear in the body of the text, these have been uniformly italicised for emphasis but are not italicised in the originals from which they have been transcribed.

² Thomas Hobbes *The Leviathan* (New York: Prometheus Books, 1988), 90.

³ As to the definition of 'existentialism', see Carl Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, Connecticut: Greenwood Press, 1996) trans. George Schwab and Erna Hilfstein from *Der Leviathan in der Staatslehre des Thomas Hobbes*, 1938, 21: 'Life is of interest only insofar as it concerns the here and the now of physical existence of the individual; of actual human beings: the most important and the highest goal is security and the possible prolongation of this type of physical existence'; see also Tracy B. Strong *Foreword to The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der*

‘To foresee an event in order to manage it is the motto of positivism, whilst an existentialist conception of both law and the world sees law like the fruit of a tree, the result of an object which has no other objective than to exist for itself. The paradigmatic value of law is contrasted with its positivistic nature.’⁵

Categorisation of the jurisprudential tradition into which Schmitt’s work readily falls is potentially riddled with confusion. As will emerge, his legacy is additionally bedevilled by the manifold contradictions and inconsistencies interwoven throughout his oeuvre. In consequence, his legal and political theory, formulated against the backdrop of National Socialist Germany, frequently proves as enigmatic as its author: at once gifted and brilliant but simultaneously mercurial, ‘*impressionistic and illogical*’.⁶

What then of Hobbes’ legal and political theory? Described variously as a ‘*classical legal positivist*’⁷ as well as ‘*a classical representative of the decisionist model*’,⁸ Hobbes contemporaneously configures his legal and political philosophy around ‘*elements of a natural order based upon individual security and consent*’.⁹ Within

Begriff des Politischen, 1932 edition, Berlin: Duncker & Humblot, 1932): ‘...there is a state of affairs that through its very existence and presence is free of all justification; that is, an existential, ‘ontological’ state of affairs - justification by mere existence. It is this quality in Schmitt at the basis of accusations of irrationalism and decisionism’. From a critical perspective, Adorno considers that existentialists utter ‘words that are sacred without sacred content’: Theodor Adorno *The Jargon of Authenticity* (1964), trans. K. Tarnowski and F. Will (Evanston, Illinois: Northwestern University Press), 1973, 9, in John Mc.Cormick *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology* (Cambridge, Cambridge University Press, 1997), 113. *Ibid.*: Mc. Cormick, 232, where Mc. Cormick seems to equate an ‘almost religious fundamentalism with communitarian existentialism at the base of Schmitt’s constitutionalism’. Certainly, in the early part of his scholarly career when Schmitt still retained overt allegiance to the ethos of the Roman Catholic Church, religion and a sense of community were, to Schmitt, inextricably linked. On the communitarian aspect of Schmitt, see Carl Schmitt *The Visibility of the Church: A Scholastic Consideration* (1917), 51 appended to his *Roman Catholicism and Political Form* (Westport: Greenwood Press, 1996) trans. Gary Ulmen from *Römischer Katholizismus und politische Form*, 1923: ‘A man totally dedicated to God is as little an individual as one totally immersed in the mundane world. Individuality co-exists only in that God keeps the person in the world. The person is unique in the world and thus also in the community. His relation *ad se ipsum* is not possible without a relation *ad alterum*. To be in the world means to be with others. From a spiritual standpoint, all visibility is construed in terms of a constitution of community. The members of a community derive their dignity from God and this cannot be destroyed by the community. But they can only return to God through the community’.

⁴ Michael Salter ‘Neo-Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt’s defence at Nuremberg from the perspective of Franz Neumann’s Critical Theory of Law’ *Res Publica* Vol.5 (1999), 161, 164.

⁵ Agostino Carrino ‘Carl Schmitt and European Juridical Science’ in *The Challenge of Carl Schmitt* edited by Chantelle Mouffe (London: Verso, 1999), 180, 184.

⁶ Jan-Werner Müller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 9.

⁷ Keekok Lee *The Legal-Rational State* (Aldershot: Gower Publishing Company, 1990), 8.

⁸ Gershon Weiler *From Absolutism to Totalitarianism* (Durango, Colorado: Hollowbrook Publishing, 1994), 48.

⁹ Gopal Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000), 216.

Hobbes arguably reposes a curious conflation of contrasting jurisprudential models: the one innovative and embryonic, the other historically established. It is, however, this latter vestigial allegiance to traditional natural law thinking that, on the reading of his self-professed acolyte Schmitt, Hobbes entirely eschews in favour of a trenchant brand of sovereign authoritarianism, drained of all moral content. This, for Schmitt, is tantamount to ‘decisionism’:¹⁰

‘For jurists of the decisionist type, it is not the command as command but the authority of the sovereign decision with which command is given that is the source of all *Recht*, that is, of all ensuing norms and orders.’¹¹

Purportedly represented as a template for this idiosyncratic mode of amoral decisionistic thought,¹² Schmitt casts Hobbes in inspirational mode as ‘sole retriever of an ancient prudence’,¹³ neither susceptible to the ‘righteousness of positivity’,¹⁴ (unlike Schmitt’s contemporary nemesis Hans Kelsen), nor the vagaries of a natural law philosophy that, on a Schmittian interpretation, had ‘never constituted a true ideology’.¹⁵

Hobbes and Schmitt: two men of brilliant intellect, each engaged in an enduring quest for a coherent legal system; an enterprise destined to generate provocative and frequently dazzling postulated hypotheses about the origins and operation of ‘law’ itself. Indeed, such is the virtuosity of their respective endeavours that the question surely is not whether but what insights are thereby derivable into the dilemmas posed by the *ex post facto* formulation and utilisation of criminal sanctions. To view the

¹⁰ According to Bendersky, decisionism is for Schmitt, ‘in essence, a system of law not reliant upon norms or concrete orders but pure decision’: Joseph W. Bendersky *Introduction to On the Three Types of Juristic Thought* (Westport, Connecticut: Praeger, 2004) trans. Joseph W. Bendersky from *Über die drei Arten des rechtswissenschaftlichen Denkens, 1934* (Hamburg: Hanseatischen Verlagsanstalt A.G, 1934), 21. Speaking of the Italian debate on the demerits of decisionism, Nicoletti comments: ‘According to Roberto Bobbio, decisionism can be understood on two levels, firstly a legal theory to which law is not the totality of norms emanating from an authority legitimised by the constitution and the procedures it spells out and secondly, the province of a sovereign power’: Michele Nicoletti, ‘Carl Schmitt *nella Stampa Periodica Italiana*’ trans. Camilla R. Nielsen *TELOS* No. 72, (Summer 1987), 217, 221.

¹¹ Carl Schmitt *On the Three Types of Juristic Thought* (Westport, Connecticut: Praeger, 2004) trans. Joseph W. Bendersky from *Über die drei Arten des rechtswissenschaftlichen Denkens, 1934* (Hamburg: Hanseatischen Verlagsanstalt A.G, 1934), 59.

¹² The validity of this assertion is explored *inter alia infra*: section 6.

¹³ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 86: ‘Today we grasp the undiminished force of Hobbes’ polemics, understand the intrinsic honesty of his thinking and admire the imperturbable spirit who fearlessly thought through man’s existential anguish and, as a true champion, destroyed the murky distinction of indirect powers’.

¹⁴ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 66. The reference to ‘righteousness’ is laden here with sarcasm.

¹⁵ Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* trans. and annotated by G.L. Ulmen (New York: Telos Press Ltd.), 181.

challenges posed by the retrospectivity debate through the nuanced gaze of one such as Hobbes, who in foraging for stability amongst the remnants of natural law ultimately seized upon an ingenious quasi-positivist resolution, is intriguing. But what equally fascinates is the theoretical impact upon the legitimacy of retrospectively-deployed criminal law when, reminiscent of the mature Schmitt, natural law is seemingly stripped from the equation: where the validity of law depends neither on its conformity with the ideal norms of a transcendent perfection nor fidelity to an immanent rationality; not even on a closed and gapless system of legal norms emanating from rigorous adherence to pre-ordained procedural requirements (as with Kelsenian positivism), but rather on the exclusive authority of a sovereign entity through whose unmediated political will legal regulations are both created and enforced.

The scene is set

The present Chapter seeks to highlight the principal tenets of Hobbes' legal and political thought and to analyse the theoretical stance of Schmitt by reference, where appropriate, to that of his ambiguous predecessor. What this entails is a distinctly jurisprudential rather than socio-legal, historical or empirical reading. Integral to this discussion will appear an account of the implicit stance of Schmitt towards the validity of natural law. These inquiries will be undertaken to the extent required to unveil key aspects of Schmitt's own legal and political system and, in the context of Hobbes, to elucidate the conflation of traditional natural law elements and novel quasi-positivist aspects intrinsic to his then innovative theory of the state. As specifically deployed by Hobbes, to what extent do either or both of these opposing jurisprudential strands serve to inform and illuminate the retrospectivity debate?¹⁶

If it emerges that Hobbesian theory lays the foundation of modern legal positivism, then no coherent assessment of Schmitt's work is complete nor, perhaps, even feasible without regard to his remorseless contempt for the most extreme variant of a positivist mode of thought - Kelsenian normativism. Integral to the 'pure theory of law' that Kelsen propounds is the stipulation that positively-given law is *'legitimate, not because it corresponds to substantive principles of justice but rather because it is enacted in a procedure which according to its structure is just; that is, democratic'*.¹⁷ Crucial elements of Schmitt's polemical diatribe against his principal scholarly adversary are therefore extrapolated below, as are facets of his theory arguably owing more than a passing debt to that same legal positivism, unceasingly vilified and ostensibly repudiated by Schmitt.¹⁸ Whether this claim – the rejection of positivistic value neutrality - is wholly sustainable is, perhaps, contentious but what is more susceptible to

¹⁶ Notably, it was Hobbes' use of positivistic elements and the manner in which he attempted to combine and reconcile the social contract theory of natural law with positivist aspects that rendered his philosophy so innovative.

¹⁷ Ingeborg Maus *'Volk und Nation im denken des Aufklärung'* quoted in Gopal Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000), 89.

¹⁸ John Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge, Cambridge University Press, 1997), 218-219: 'Schmitt's "decision" is unconstrained and is therefore potentially as "substanceless" as Kelsen's positivist formalism. In fact, Habermas asserts that Schmitt and Kelsen are opposite sides of the same coin and that ultimately their positions are interchangeable: there is a concrete will at the base of Kelsen's formalism and a purely formalistic tendency to Schmitt's emphasis on concrete will'.¹⁸

empirical certitude is the unparalleled upheaval of the respective eras into which both Schmitt and Hobbes were inadvertently propelled by accidents of history.¹⁹

Accordingly, the opening section of this chapter considers the import of Schmitt's preoccupation with the dynamics and tensions of the prevailing concrete reality. The exigencies of the volatile changing circumstances, over which he evidently felt a troubling lack of control, exacerbated this tendency to startling effect and seemingly spawned his fear of civil unrest and its corollary, a lifelong unalloyed obsession with the instigation and preservation of 'order':

'The chaos of this period (*the turmoil at the end of World War I*), the violence and uncertainty about one's personal security greatly affected Schmitt's thinking and attitudes. For the duration of the Weimar Republic, Schmitt was haunted by the thought of a breakdown of civil order and the re-enactment of those revolutionary events (*the Bolshevik revolution in Russia*).'²⁰

This is followed by some brief biographical and contextual details relevant to Schmitt's genesis and subsequent opprobrious reception as a 'Nazi theorist'. Specifically, an overly-close association with the jubilant Nazi regime from 1933-1936 was to earn him the epithet, 'Crown Jurist of the Third Reich'²¹ and irrevocably stigmatise his post-war intellectual and personal reputation. Though marginalised by the Nazis after 1936, this fall from grace failed to spare him the indignity of US-instigated internment in March 1947,²² during which he was interrogated as a potential Nuremberg defendant by Robert

¹⁹ Hobbes lived in the shadow of the English Civil War, during which considerable chaos was generated by the overthrow of the monarchical system of government (Charles I) and for the first and only time in British history, the establishment of a Republic under the auspices of the Protector, Oliver Cromwell.

²⁰ Joseph W. Bendersky *Carl Schmitt: Theorist for the Reich* (Princeton, New Jersey: Princeton University Press, 1983), 22.

²¹ This appears to have originated with Schmitt's one time student and friend, Waldemar Gurian, a Russian émigré of Jewish descent, who later expressed horror in Schmitt's affiliations with the National Socialist regime. Gurian worked for the editorial staff of the Catholic *Kölnische Volkszeitung* and it was in this publication that the epithet, 'Crown Jurist' first appears to have been coined on 11th May 1933. In contrast, Bendersky posits that 'Schmitt acquired an erroneous reputation as Crown Jurist of the Third Reich. He was really nothing more than a temporary figurehead': *supra*: Bendersky, *On the Three Types of Juristic Thought*, 17. See also John Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge, Cambridge University Press, 1997), 267, 'It is a curiosity of the post-war German intellectual scene that Schmitt is remembered as the legal theorist of National Socialism, when he actually failed in his attempt to attain such a status'.

²² According to Muller, Schmitt had previously been arrested by the Soviet Red Army on 30th April 1945, only to be released a few hours later. He was arrested and released for a second time, on this occasion by the Americans, as a security threat in the autumn of 1945 and released in autumn 1946. His third detention commenced in March 1947 and lasted approximately two months, prior to his final release in May 1947: Jan-Werner Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 47. However, Bendersky mentions two internments only, the first following arrest by the Russians in Berlin in April 1945, and the second, in September 1945, when he was arrested by the Americans and held in internment camps until March 1947. At this

Kempner and Ossip Flechtheim, two members of Telford Taylor's staff. This uncomfortable proximity to imminent prosecution before the International Military Tribunal, in conjunction with his arguably ambiguous role, both in the collapse of the Weimar Constitution and the maelstrom of Nazi Germany during the 1930s, renders study of Schmitt's political and legal philosophy particularly arresting. It is, therefore, against the backcloth of his fascist affiliations and subsequent unsolicited flirtation with the Nuremberg process that his work must be read:

'The major danger in the reception of Schmitt's work is to de-historicise it. It should not be lifted out of the socio-historical context in which it originated'.²³

The perceived fragility of the Weimar Republic, prior to its demise in 1933, provided ample scope for Schmitt's highly-politicised machinations. It was in this specific context that Article 48 of the Reich Constitution was to prove particularly productive. To this end, Section 3 presents a brief foretaste of the dubious contribution of this provision to the longevity of the Weimar Republic. Interpretation of Article 48 lay at the heart of the lionisation of executive power over the legislative authority vested in the Reichstag (German Parliament). Here, Schmitt's equivocal role as defender or destroyer of the liberal constitutional regime, ambitiously inaugurated in post-World War I Germany, was to prove crucial. Did he fulfil a legitimate role as '*the self-anointed cleric of post-neutralisation Europe*' or, in contrast, is he more properly cast as '*the Mephistopheles of Weimar Germany*'?²⁴

Section 4 commences with a short account of the pre-eminence attained during 19th century Germany of 'legal positivism', a system that was to prevail, substantially intact despite challenge to its dominance, into the second decade of the ensuing century. Destined to comprise the jurisprudential foundation for the Weimar Constitution, the positivist theory of law came unremittingly under siege from Schmitt's withering, deconstructive critique:²⁵

stage, Bendersky states that Schmitt was transferred to Nuremberg as a potential defendant in the War Crimes Trial when he underwent interrogation during a two month period culminating in his discharge in May 1947: Joseph W Bendersky, 'Carl Schmitt at Nuremberg' *TELOS* No. 72 (Summer 1987), 91.

²³ Richard Wolin 'Carl Schmitt, political existentialism and the total state' *Theory and Society* Vol. 19 (1990), 389-416.

²⁴ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 103, 116.

²⁵ Even the early Schmitt linked the value-neutrality of positivism with economic rationalism under which modern technology, as with a stringently positivistic concept of law, is purportedly unable to draw the distinction between that which is objectively desirable and that which is not. On this point see: Carl

‘The process of formalising and neutralising the concept of the constitutional state into a calculable, functioning legal system of the state, indifferent to aims, intrinsic truths and justice is known by the name of legal positivism and had become in the 19th century the dominant juristic doctrine.’²⁶

Vilification of positivism, as specifically instantiated through liberalism, was to become Schmitt’s polemical lodestar. On this point, his early works are briefly visited to detect any incipient shades of the condemnation he later vehemently asserted towards positivism in its various manifestations, the ‘*normativistic*’ failure of liberalism ‘*to acknowledge the enigma of legal indeterminacy*’²⁷ and the professed dread of political disorder that were to colour his writings during the Weimar period and beyond.²⁸ Accounts of these early texts will also be examined to determine whether elements of natural law inhabit Schmitt’s early legal and political theory.

As mentioned above, Schmitt was to adopt key aspects of Hobbes’ own politico-legal philosophy, though in a selectively distilled and significantly radicalised form, to enable

Schmitt *Roman Catholicism and Political Form* (Westport: Greenwood Press), 1996, trans. Gary Ulmen from *Römischer Katholizismus und politische Form*, 1923, 14: ‘A marvellously rational mechanism serves one or other demand, always with the same earnestness and precision, be it for a silk blouse or poison gas or anything whatsoever’. In the context of the National Socialist regime which was to follow only 10 years later, these were prophetic words indeed. Yet, ironically, Schmitt related his critique to the formality and supposed neutrality of positivism rather than the horrors indicative of the Nazi-induced Holocaust, where poison gas became not merely a hypothetical Schmittian construct but a concretised instrument of the death of millions.

²⁶*Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 68.

²⁷ William E. Scheuerman ‘Legal Indeterminacy and the Origins of Nazi Legal Thought: the Case of Carl Schmitt’ *History of Political Thought* Vol. 17 No. 4 (Winter 1996), 571-590: ‘In the early 1930s, Schmitt openly emphasizes the problem of legal indeterminacy in order to justify an authoritarian alternative to Weimar democracy’; attempts to camouflage it or to assert its effective elimination within a normatively-constructed regime were, in Schmitt’s view, nothing short of hypocritical. See also William E Scheuerman *The End of Law* (Lanham: Rowman & Littlefield Publishers Inc, 1999): Scheuerman takes as his theme Schmitt’s putative fear of legal indeterminacy and the tendency of liberalism to obscure the role of indeterminacy within the *legal* universe. *Ibid*: 115: ‘For Schmitt, the central problem of legal theory is the enigma of legal indeterminacy by which legal norms inevitably fail to provide meaningful guidance to legal decision-makers’.

²⁸ According to Kanwar: ‘Schmitt remained convinced that all law is situational law. This remained his empirical position; only his prescriptions changed. The belief in the radical indeterminacy (and manipulability) of the law was treated at times with attempts to radicalise this indeterminacy and at other times to tame and minimise it. On one hand, Schmitt consistently valorised de-formalised decision making procedures (discretion) in the hands of the sovereign state. On the other hand, he emphasizes the radical indeterminacy of liberal law including international law, harshly criticising the use of open-ended discretionary standards. For Schmitt, factual power is prior to legal order. For Kelsen, legal order is a precondition to factual power. This privileges the norm over the decision. The indeterminacy of liberal law is not the same thing as the de-formalised law of the decisionist. His programmes for harnessing or radicalising indeterminacy shifted with his political fortunes, yet he always suggested that some form of determinacy was possible. Unlike liberals who looked to the rule of law, he tended to look for the rule of men (concrete situations of sovereignty) to reach authoritative judgments’: Vik Kanwar ‘Dark Guardian of the Political: Carl Schmitt’s Ethical Critique of the Liberal International Order’, available online: <http://kanwar.info/schmitt.html> (accessed 18 September 2006).

him to develop and augment the formulation of his unique decisionist theory of law and the State.²⁹ Section 5 seeks, therefore, to provide a depiction of the central elements of Hobbesian authoritarianism and the extent to which Hobbes permitted fragments of the prevailing, contemporary 17th century natural law tradition to pervade and, indeed, arguably underpin his theory of civil society.³⁰ In contrast, it was Hobbes' synchronous endorsement of the supreme sovereign as the sole source of the content and justice of law that evinced his drastic departure from a traditional natural law position. Having drunk at the well of an incipient brand of authoritarian positivism, he patently relished what he tasted. This was destined to instigate a rupture in the established jurisprudential configuration that was to reverberate through the centuries; indeed, down the rivulets of time, to Schmitt and his contemporaries.

Making that temporal leap, Section 6 proceeds to consider the complex cornerstones of Schmitt's philosophy emergent from his Weimar writings: its bedrock of 'decisionism', the notions of commissarial and sovereign dictatorship encompassed within his conceptualisation of sovereignty, the primacy of the 'exception' during a state of emergency with the concomitant subordination of the legal norm; the friend/enemy antithesis and the concept of 'the political'. Closely bound to the disintegration of the Weimar Republic, these will be linked to Schmitt's ambivalence towards the Constitution and specifically to his 'latitudinarian' interpretation of Article 48, under which the President was putatively empowered to acquire virtually limitless authority in the interests of preserving order.³¹ Focus is likewise directed in this section to

²⁹ Schmitt also at times paid homage to other theorists, including Max Weber and Jean-Jacques Rousseau together with the counter-revolutionaries, Bonald, De Maistre and Donoso Cortes. These are discussed in relation to the pertinent aspects of Schmitt's own legal and political systems.

³⁰ By the 17th century, Schmitt believed that in a European quest for 'neutrality' devoid of conflict, the metaphysical age had superseded the theological, just as this in turn was overtaken by the humanitarian age of the 18th century, the economic age of the 19th and finally, what he termed, the age of technicity of the 20th century. 'The 17th century was not only metaphysically but also scientifically the greatest age of Europe – the heroic age of occidental rationalism': Carl Schmitt, 'The Age of Neutralisations and Politicisations' *TELOS* No. 96, (Summer 1993), 130, 132. Likewise, he dubbed 17th century Hobbesian decisionism the age of princely absolutism, the 18th the age of rational law normativism and the 19th the era of positivism, reflective of the specific dualistic structure and division between state and society; executive and legislature: *supra*: Carl Schmitt *On the Three Types of Juristic Thought*, 97.

³¹ See Carl Schmitt *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der Begriff des Politischen*, 1932 edition, (Berlin: Duncker & Humblot, 1932) (first edition written in 1927); Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Massachusetts: MIT Press, 1985) trans. George Schwab from *Politische Theologie*, 1922 (Berlin: Duncker & Humblot, 1934); Carl Schmitt *Die Diktatur (1921)* (this is discussed *inter alia* in Jan-Werner Müller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003); David Dyzenhaus *Legality and Legitimacy* (Oxford:

Schmittian notions of homogeneity, democracy, the naïve disavowal by liberal democracy of the ubiquitous spectre of dictatorship within the *political* universe³² and his self-vaunted quest for legitimacy.³³ All were dominant thematic strands in Schmitt's work, as was his demolition of the principle of 'equal chance' purportedly embedded within the Weimar Constitution and ultimately to prove the juristic instrument of the Republic's liquidation.³⁴

Manifest throughout Schmitt's work is his polemic against liberal legality and the value neutral positivism that sporadically characterises its conceptualisation of the legal order as a closed system of norms. Appropriate it appears, therefore to offer an intermittent rejoinder to this invective on the assumption that integral to classic liberal constitutionalism is a countervailing imperative to defend its pivotal bastions: the rule of law, separation of powers and individualistically conceived civil liberties and *a priori* contra-state rights. To this extent, the articulated critique of Schmittian theory is

Oxford University Press, 1997); Gopal Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000) and William E Scheuerman *The End of Law* (Lanham: Rowman & Littlefield Publishers Inc, 1999).

³² On this point, see William E. Scheuerman 'Legal Indeterminacy and the Origins of Nazi Legal Thought: the Case of Carl Schmitt' *History of Political Thought* Vol. 17. No.4 (Winter 1996), 571-590; this was the corollary to Schmitt's belief that a major deficiency of liberalism lay in its 'naïve' and possibly hypocritical denial of any form of legal indeterminacy. Instead of 'grasping the nettle' and conceding the impossibility of prescribing a prior legally regulated regime for every conceivable political upheaval, liberals (according to Schmitt) persist in their denial that 'in its very essence, all legal experience is permeated by indeterminacy, by the ever-changing demands of the "concrete exception": *ibid*: 587. Schmitt, in contrast, appears at various points throughout his writings to embrace, and therefore, to formulate what is, in his view, an adequate response to the ubiquitous problems posed by legal indeterminacy: dictatorship. On this point, see for example, his early Weimar work, '*Political Theology*', in which his principal goal apparently lies in discrediting any workable concept of legal determinacy within a traditional liberal framework. This latter is, for Schmitt, simply not a viable option. See *supra*: Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*.

³³ According to Schmitt, no equation exists between the formal legality of law and its intrinsic legitimacy. To this limited extent, though not in his conclusions and recommendations, his views mesh with those of Herman Heller. On this point see Hermann Heller 'The Essence and Structure of the State' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 266: That the most common form today of understanding legitimacy is a belief in legality, the readiness to conform to formally correct precepts that have come into being in compliance with conventional form is simply false...The organisational division of powers has simply the purpose of guaranteeing legal certainty and is thus simply a technical instrument that has nothing to say about the rightness of law. The legality of the state based on the rule of law is not in a position to replace legitimacy'.

³⁴ See Carl Schmitt *The Crisis of Parliamentary Democracy* (Cambridge and Massachusetts: MIT Press, 1985) trans. Ellen Kennedy from *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 1923 (Duncker & Humblot, 1926); Carl Schmitt *Legality and Legitimacy* (Durham and London: Duke University Press, 2004) trans. and edited by Jeffrey Seitzer from *Legalität und Legitimität*, 1932 (Munich and Leipzig: Duncker & Humblot, 1932) and Carl Schmitt *Verfassungslehre* (Constitutional Theory) (1928) discussed *inter alia* in David Dyzenhaus *Legality and Legitimacy* (Oxford: Oxford University Press, 1997) and William E Scheuerman *The End of Law* (Lanham: Rowman & Littlefield Publishers Inc, 1999).

initially predicated upon this liberal commitment to preserve the cornerstones of the ideological position it seeks to espouse. Subsequent perusal of the invective Schmitt launches against the liberal principle of ‘equal chance’ affords an opportunity to scrutinise his onslaught from a more immanent perspective.

Concomitant with evaluation of Schmitt’s legal and political philosophy will appear scrutiny of the following issues:

- (i) From a Schmittian perspective, is an embargo upon retrospectively-deployed criminal law inextricably affiliated to a particular constitutional form? If so, is this represented by the *Rechtsstaat*, supposedly institutionalised within 1920s Germany? This, in its ideal mode of operation, is traditionally characterised by the doctrine of separation of powers; the general publicised norm; an independent, de-politicised judiciary; an unswerving respect for a litany of fundamental human rights³⁵ and total certainty and predictability of legal application:

‘Recht thinking became legality thinking; the unconditional subjugation to the will or contents of a specific norm: one subjugates oneself to the norm and its clearly identifiable content. This gave to positivistic legality thinking the ostensible value of the greatest objectivity, firmness, inviolability, security and calculability, that is, positivity.’³⁶

- (ii) On this premise, is a constitutional prohibition against retrospectivity sustainable only when locked into this ‘liberal’ constitutional-law type State? If so, would Schmitt argue that once the edifice collapses, the utilisation of *ex post facto* criminal law is then not only supportable, but inevitable?
- (iii) Relatedly, is it feasible or legitimate to address such issues, without scrutiny of Schmitt’s polemically vitriolic and incendiary condemnation of the *Rechtsstaat*, for him the emblematic representation of the bourgeois liberal state:

³⁵ See Carl Schmitt ‘The Liberal Rule of Law’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 294, 295: ‘This state, based on the liberal rule of law, is generally characterised by its foundation on the basic rights of the individual and the principle of separation of powers. In this context, the freedom of the individual is generally unlimited, the state and its powers limited. It is not fixed by law and the unavoidable exceptions must be determined by previously defined norms’; against this, see J. Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 196: ‘The Rule of Law is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies’; see also Charles Sampford *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006), 48 in which Sampford highlights that according to the ‘thin theory’ of the Rule of Law, as postulated for example by Raz, the Enlightenment values of democracy, citizenship and human rights are not indispensable components of the Rule of Law.

³⁶ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 65.

‘A liberal constitutional normativism diverted German constitutional thought from the concrete reality of intrinsic German problems and twisted it into the normative thinking of the Rechtsstaat.’³⁷

- (iv) In the event that Schmitt does hold the liberal constitutional state in disdain, ought he to have equal contempt for each of the pivotal foundations upon which it rests, including its traditional repudiation of *ex post facto* law?
- (v) Does Schmitt leave scope, therefore, within his theoretical arsenal for any residual allegiance to the notions of certainty, predictability and fidelity within the operation of the law; to insistence upon the substantive or procedural generality of the norm; indeed, to the fundamental cornerstones of the ‘rule of law’ itself?

The 1938 Schmitt bemoaned Hobbes’ *‘taste for esoteric cover-ups’*; his tendency to *‘open the window only for a moment and close it quickly for fear of a storm’*.³⁸ What follows will evaluate whether this tendentious summation of Hobbes could be more appropriately applied to Schmitt; variously portrayed as an amoral opportunist and unremorseful fascist but, conversely, still *‘generally recognised as the most gifted political and legal theorist of his generation.’*³⁹ A jurist whose *‘personal conduct shortly before and during the Nazi regime has aroused the most discrepant reactions, ranging from disgust and even hatred, to rationalisation, apology and justification’*.⁴⁰

Hewn from unprecedented conflagration and possessing the capacity to compel and simultaneously repel in equal measure, what insights does Schmitt’s literary *corpus* provide in addressing the previously posited issues concerning the validity of retrospectively implemented international criminal law?

³⁷ *Ibid*: 45.

³⁸ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 33.

³⁹ Richard Wolin ‘Carl Schmitt, political existentialism and the total state’ *Theory and Society* Vol. 19 (1990), 389-416, 389.

⁴⁰ Ulrich K. Preuss ‘Political Order and Democracy: Carl Schmitt and his Influence’ in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 155.

Section 1: the search for a system

As above, it was during the cataclysmic demise of the Weimar Republic and Hitler's attendant rise to power that Schmitt, hailed as '*a lucid and clinical analyst of historical processes*',⁴¹ compiled his contentious dissertations of Weimar and beyond.⁴² Given his belief in the uniqueness and fascination of historical events,⁴³ the disintegration of a Constitution surely represented a surfeit of unprecedented upheaval from which to derive intellectual inspiration:

'All historical knowledge receives its light and intensity from the present; all historical representations and constructions are filled with naïve projections and identifications; only a consciousness or our own historical situation will provide historical insight.'⁴⁴

Unsurprisingly, perhaps, significant aspects of his legal and political theory represent a confluence between these momentous experiences and a selectively interpreted exposition of history. As the Weimar Republic fell into a condition of inexorable decay, Schmitt wove together a potent theoretical amalgam, delving into an often idealised version of history in an insatiable quest for a system where 'order', once established, can be perpetually sustained:

'All concepts such as God, freedom, progress, anthropological conceptions of human nature, the public sphere, rationality and finally the concepts of nature and culture itself, derive their concrete historical content from the situation of the central spheres and can only be grasped there from.'⁴⁵

To Schmitt, law is always a concrete system, inalienable from its precise historical context.⁴⁶ Real law is not set in stone but develops involuntarily. The concreteness of

⁴¹ Agostino Carrino 'Carl Schmitt and European Juridical Science' in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 180, 189.

⁴² See John Mc.Cormick who comments in his *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge, Cambridge University Press, 1997), 300 that 'Schmitt's historicism is more like that associated with existentialism. Schmitt's is the mind that stands outside of history'.

⁴³ George Schwab *The Challenge of the Exception* (New York: Greenwood Press, 1989), 27

⁴⁴ Carl Schmitt *Preface to Concept of the Political* (Duncker & Humblot, 1963), 17.

⁴⁵ Carl Schmitt 'The Age of Neutralisations and Depoliticisations' *TELOS* No. 96, (Summer 1993), 130.

⁴⁶ Jeffrey Seitzer *Introduction to Constitutional Theory* (Durham and London: Duke University Press, 2008) trans. and ed. Jeffrey Seitzer from *Verfassungslehre* (Berlin: Duncker & Humblot, 1928), 443-444, n. 31: 'A particularly important element in Schmitt's intellectual background can be found in nineteenth-century historiographical reflection. Historicism was an intellectual outlook that rejected the rational-metaphysical, universalist and ius-natural traditions of social analysis derived from the Kantian Enlightenment and it argued that each nation has its own distinctive laws, and its own very distinctive ideas about legitimacy and natural order. In consequence, historicism argued for highly relativising definitions of political legitimacy and cultural integrity and it positioned itself against all formalist models of legal order.' *Ibid*: Seitzer, 444, n. 31: 'We can see at the very heart of Schmitt's work the historicist claim that humanity is constituted by its shared historical experiences, is transformed into an existential or anthropological argument that sees human existence as constituted by its shared possession of a uniform

law is not some kind of material empiricism; rather, it is always related to the history of a people.⁴⁷ Law is the expression of individual national spirit; ‘*what a person is organically and what Volksgeist signifies, can only be determined historically*’.⁴⁸ The question: ‘who decides’ in the context of any political system is entirely dependent upon historical circumstances.⁴⁹ As such, Schmitt is not interested in the location of any purported moral purpose in history. Every culture is rooted in distinctive national attitudes and as such, ‘*any idea of universal morality and law is mere fantasy*’.⁵⁰ If the concrete situation has intrinsic value, then eternal values are necessarily non-existent; an historical truth is true only once in the sense of a transient, not an eternal truth.⁵¹ Free-floating jurisprudence is not feasible in that a link to a historically concrete, total order is indispensable.⁵² What role then for the conceivably fanciful norms of the natural law tradition?

‘His (Schmitt’s writings) remained immune to the essentially non-historical natural law concept which has formed a cornerstone of scholastic thought since its inception. Whatever natural law may mean, one of its aspects is clear, namely that natural law and Schmitt’s sense of the concrete and of the uniqueness of historical situations are incompatible.’⁵³

For Schmitt, the professedly unrealisable quest for a universally-accepted truth, characterised by an inevitable dependency upon ubiquitous and eternal values, contribute nothing to a sustainable political system. Indeed, undetectable in his late Weimar writings, is any ‘*basic set of eternal values to which he adheres. Schmitt may be classed as an adherent of the historicists who maintain that all human thought is historical and hence are unable to grasp anything eternal*’.⁵⁴ Crucial to Schmitt is the contingency of the right to dominate and this, in turn, is attainable only through

political will. This perspective views such politicality as the defining resource of human life and as the resource that the legitimate state must both represent and protect from all formal, positivist or non-political violation.’

⁴⁷ Agostino Carrino ‘Carl Schmitt and European Juridical Science’ in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), pp 180-194 (citing Carl Schmitt *Die Lage der europäischen Rechtswissenschaft* (1950) in *Verfassungsrechtliche Aufsätze aus den Jahren 1924 -1954*, 91, 426.

⁴⁸ Carl Schmitt *Political Romanticism* (Cambridge, Massachusetts: MIT Press, 1986) trans. Gary Oakes from *Politische Romantik*, 1919 (Duncker & Humblot: Berlin, 1925), 62.

⁴⁹ Schmitt commonly expresses this in the Latin form: ‘*quis iudicabit?*’

⁵⁰ Henry Grosshans ‘Review of Political Romanticism *TELOS* No. 72, (Summer 1987), 214, 215.

⁵¹ *Supra*: Schwab *The Challenge of the Exception*, 20. See also Carl Schmitt *Political Romanticism* (Cambridge, Massachusetts: MIT Press, 1986) trans. Gary Oakes from *Politische Romantik*, 1919 (Berlin: Duncker & Humblot, 1925), 5: ‘We have to take every intellectual movement seriously, both metaphysically and morally, not as an instance of an abstract thesis, but as a concrete historical reality in the context of a historical process’.

⁵² *Supra*: Schmitt *On the Three Types of Juristic Thought*, 73.

⁵³ *Supra*: Schwab *The Challenge of the Exception*, 20.

⁵⁴ *Ibid*: 55.

'knowledge of 'one's own temporal and cultural predicament' derived from 'a correct assessment of the whole historical situation'.⁵⁵ From this perfect marriage putatively flows the insight indispensable to self-preservation; indeed, to the very essence of existence.

Though this emphasis upon concrete facticity appears to preclude elements incapable of empirical verification, he never entirely eradicates an ambivalent nostalgia for his inherent Roman Catholic provenance. Indeed, to the mature post-war Schmitt, religion is interwoven with history and anthropological origins in an indissoluble trinity:

'I am a Catholic not only according to my religion but also according to my historical origin, and if I may so, according to my race.'⁵⁶ I am as Catholic as the tree is green, but have my own ideas on it.'⁵⁷

Does this signify Schmitt's intention to permit latent fragments of a natural law position to infiltrate what otherwise may appear a manifest predilection for an ontological condition, liberated from universalistic moral standards? Or is this late re-espousal of Roman Catholicism a belated attempt to justify his youthful condemnation of the un-Christian 'value-less rationality' of positivistic 'economic-technical thought'?⁵⁸ At this stage, a brief scrutiny of Schmitt's biographical resumé, juxtaposed with an historical contextualisation of his work, may lend some insight into the labyrinthine challenges his legal and political philosophy presents.

⁵⁵ *Supra*: Schmitt 'The Age of Neutralisations and Depoliticisations', 130.

⁵⁶ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 133. According to Muller, Carl Schmitt made this un-sourced claim in 1948. This is clarified by John P. Mc.Cormick in 'Review: Political Theology and Political Theology: The Second Wave of Carl Schmitt in English', *Political Theory*, Vol. 26, No. 6. (December 1998), 830-854, n. 27 where this claim, translated as: 'I am Catholic not only by confession but rather also by historical extraction – if I may be allowed to say so, racially', is sourced to Mehring, *Carl Schmitt: Zur Einfuhring*, 169, n.113.

⁵⁷ John P. Mc.Cormick in 'Review: Political Theology and Political Theology: The Second Wave of Carl Schmitt in English' *Political Theory* Vol. 26, No. 6, (December 1998), 830-854, n. 27, refers on this point to Helmut Quaritsch, *Positionen und Begriffe Carl Schmitts* (Berlin: Duncker and Humblot, 1989), 33-4. The Catholicism patent in Schmitt's post WWII thought and reminiscent of his position in *Roman Catholicism and Political Form* (Westport: Greenwood Press), 1996, trans. Gary Ulmen from *Romischer Katholizismus und politische Form*, 1923, was diametrically opposite to his 1938 stance, where Schmitt reputedly stated, 'If the Pope excommunicates a nation, so therefore does he only excommunicate himself': *ibid*: Mc.Cormick, 830-854, n. 27.

⁵⁸ *Supra*: Schmitt *Roman Catholicism and Political Form*, 13; *supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 87. The early Schmitt also likens the modern economic-technical apparatus associated with legal positivism and the positivistic State to 'the Antichrist', and as a 'fundamental antithesis to the political idea of Catholicism because this idea contradicts everything synonymous with objectivity, integrity and rationality': *supra*: Schmitt *Roman Catholicism and Political Form*, 15.

Section 2: a personal sketch⁵⁹

‘A man who is nothing but a political man would be a beast for he would be completely lacking in moral restraints’: Morgenthau.⁶⁰

Born on 11th July 1888 into a staunchly Catholic family⁶¹ of German Rhenish stock, Schmitt’s formative years were shaped by his keenly-felt Catholicism amidst the Protestant majority of Plettenberg, the small industrialised village where his parents had settled before his birth. Subjected to various forms of discrimination during the 19th century, Catholics bore the legacy of an ‘*oppressed minority*’,⁶² assiduously struggling to preserve their ‘*cultural and religious autonomy against power of the Prussian state*’.⁶³ According to Schwab, sectarian violence arising from the clannishness of Protestants and Catholics alike ‘*left an indelible mark on Schmitt’s outlook*’.⁶⁴

After a traditional boarding-school education, Schmitt fatefully embarked upon the legal studies that were terminally doomed to culminate in lifelong ignominy.⁶⁵ Following graduation from the Royal Friedrich-Wilhelm University, Berlin in 1910 and attainment of his doctorate in criminal law, he was accepted into the University of Strasbourg, ‘*centre of anti-positivist and neo-Kantian thought, intellectual currents far more compatible with Schmitt’s own spiritual predilections than the materialistic and positivistic thinking of the late nineteenth century*’.⁶⁶ Avoiding active military service during World War I on health grounds, he married for the first time to Pawla Dorotic, ‘*an Austrian con-woman with a dubious professional past*’,⁶⁷ believed by Schmitt to be a Serb aristocrat. Though divorce was anathema to Schmitt, the union acrimoniously ended in 1924 and on his re-marriage two years later to an authentic Serbian, Duschka Torodovic, he was excommunicated, thereafter remaining outside the Church until the

⁵⁹ Schmitt’s writings are dealt with separately *infra*. His entanglement with constitutional issues and specifically the interpretation of Article 48 are dealt with *infra*.

⁶⁰ *Supra*: Scheuerman *The End of Law*, 248.

⁶¹ Three of Schmitt’s great uncles had been priests involved in the *Kulturkampf* that Bismarck had waged against the Catholic Church. Manfred H. Wiegandt, ‘The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt’ *Cardozo Law Review* Vol. 16, 1569, 1573.

⁶² *Supra*: Schwab *The Challenge of the Exception*, 5

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Schmitt’s had previously displayed a keen interest in literature and philology and his decision to study law had therefore not been predicted.

⁶⁶ *Supra*: Schwab *The Challenge of the Exception*, 9. The significance of Schmitt’s early exposure to anti-positivist, neo-Kantian thought is discussed *infra*.

⁶⁷ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 19.

death of his second wife in 1950.⁶⁸ Schmitt's enforced disenchantment with Catholicism may, arguably, have influenced the tenor of his writings from the early 1920s onwards.⁶⁹

Acquiring a lectureship in Munich, in 1919, he was appointed professor of public law at the non-prestigious university of Greifswald in 1921, followed by a stint at Bonn University during the six year period spanning 1922-1928. A professorship in Berlin was to follow in 1929, bringing him into ever closer contact with the corridors of power, before he accepted a Chair at the University of Cologne in 1932. Nominated by Goering for the office of Prussian Councillor of State in July 1933, he was to retain this position, initially in a purely honorary capacity until 1936 and subsequently for a further nine years.⁷⁰ He became a member of the NSDAP on 1st May 1933 and wrote numerous tracts between 1934 and 1936, attempting to justify the legal theoretical basis for the regime to which he had chosen to nail his colours:

'Many of Schmitt's articles appeared in regular newspapers, thus helping even more effectively to consolidate the National socialist basis in the founding years of the regime. This alone would be enough to warrant the charge of a disgusting opportunism towards the Nazis.'⁷¹

As the clouds of SS disapprobation descended upon him, he withdrew from leadership of the National-Socialist Jurists, in 1936, after three years in post.⁷² As Wiegandt cryptically observes, '*Schmitt should have been grateful to the SS for stopping him before he really could become a culprit*'.⁷³ This notwithstanding, he was able to continue as a Councillor of State and retain his prized Chair at the Royal Friedrich-Wilhelm University in Berlin, held since 1933. Thereafter, international horizons

⁶⁸ Duschka was the mother of Schmitt's only child, Anima, whom he also outlived.

⁶⁹ Schmitt still held the Church in high esteem in 1923, conferring upon it the accolade, 'complex oppositorium', a 'unity of contradictions', in his view, an institution able to respond to a diversity of situations whilst still retaining the power indicative of Catholicism: *supra: Roman Catholicism and Political Form*.

⁷⁰ The Council of State did not sit between 1933 and 1936.

⁷¹ *Supra*: Wiegandt 'The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt', 1588.

⁷² 'Notwithstanding his fall from favour in 1936, Schmitt was paraded by the Nazi state around the law faculties of Spain, Budapest and occupied Europe between 1942-1943, as part of an attempt to present a respectable scholarly front for Hitler's Germany': *supra*: Salter, 'Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's Critical Theory of Law', 161, 179.

⁷³ *Supra*: Wiegandt 'The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt', 1569, 1595.

proved an ostensibly safer haven for the chastened Schmitt.⁷⁴ Never again did he risk the evocation of Nazi displeasure. But ironically, it was this same excursus into the geopolitical domain, specifically his *Grossraume* (or ‘great spaces’) theory, that was to partially fuel the Allied onslaught against him during his 1947 interrogation.⁷⁵ Bendersky reports the pursuit of three principal threads of argument:

‘Did Schmitt’s Grossraum writings provide the theoretical foundation for Hitler’s expansionist policies, making him an accomplice in wars of aggression? Had he served in a decision-making capacity? What was his relation to the Jewish question?’⁷⁶

In Kempner’s assessment, however, insufficient evidence existed to implicate Schmitt in the perpetration of crimes against humanity, murder of prisoners of war or preparation of aggressive wars.⁷⁷ Following his successful exculpation, in part, on the grounds that similar to the deskbound Thomas Hobbes,⁷⁸ he was purely engaged in scholarly activity as an ‘*intellectual adventurer*’,⁷⁹ Schmitt was permitted to retreat to Plettenberg, the place of his birth. Residing in his secluded home until his death on 7th April, 1985, Schmitt was never again to teach in a German university.⁸⁰ This was an inevitable by-product of his refusal to publicly extenuate his putative guilt by submitting to de-nazification. From Schmitt’s perspective, why participate in any such process of expiation, given an unshakeable conviction in his own lack of culpability?⁸¹

Yet, his epitaph surely cannot present an equally sanguine testament to his overt collaboration with a Nazi regime, seen as the archetypal example of ‘*pure politics*

⁷⁴ Bendersky gives an account of Schmitt’s biographical details, though like Schwab, *supra*: n. 56 is commonly regarded as an apologist for Schmitt, insofar as relates to his association with the Nazi regime: *supra*: Bendersky *Carl Schmitt: Theorist for the Reich*, 13ff.

⁷⁵ Schmitt’s stance towards the empirical and normative issues embedded within the Nuremberg proceedings is discussed further *infra* Chapter 5.

⁷⁶ Joseph W Bendersky ‘Carl Schmitt at Nuremberg’ *TELOS* No. 72, (Summer 1987), 91, 94.

⁷⁷ *Supra*: Wiegandt ‘The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt’, 1569, 1596 citing Paul Noack, *Carl Schmitt: Eine Biographie* 9 (1993). Despite the ultimate decision not to prosecute, claims made about Schmitt by his initial US interrogators contain references to how Schmitt was ‘the official constitutional apologist’ for the Nazi regime and ‘the most eminent legal exponent of the Nazi ideology’: ‘Preliminary Interrogation report of Carl Schmitt, Berlin, October 18th, 1945, NA RG 238, cited *supra*: Salter ‘Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt’s defence at Nuremberg from the perspective of Franz Neumann’s Critical Theory of Law’, 161, 176; see also *supra*: Bendersky ‘Carl Schmitt at Nuremberg’, 91

⁷⁸ Robert Kempner ‘Interrogation of Carl Schmitt I-III’ *TELOS* No. 72, (Summer 1987), 97, 103.

⁷⁹ *Ibid*: 103.

⁸⁰ During his ‘retreat’, he was nonetheless frequently visited by scholars of renown.

⁸¹ *Supra*: Wiegandt ‘The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt’, 1569, 1596.

unrestrained by morality; a form of power for power's own sake, in which political activities are seen as fundamentally unrelated to moral concerns'.⁸² His was a life profoundly influenced by the birth of the Weimar Republic in the wake of WWI and its tragically premature demise only 14 years later. This was to lead inexorably to a second, still more devastating conflict in WWII. During this second world conflagration, unspeakable atrocities occurred and it was the perpetration of these unparalleled horrors that actuated judicial retribution at Nuremberg. This process, therefore, obliquely flowed from the Weimar debacle and there once again fatefully dovetailed with Carl Schmitt, a theorist who relentlessly railed against what he perceived the liberal deficits of the Republic that rendered its 1933 collapse inevitable.

⁸²*Supra*: Scheuerman *The End of Law*, 248

Section 3: A blighted Constitution and the death of a Republic

In light of the above, any analytical account of Schmitt's legal and political theory would be, at best, structurally fragile and, at worst, fundamentally flawed were it severed from its historical setting:

'When Schmitt is studied outside his cultural-historical context, it is sometimes difficult to read and comprehend his work, and it can also be reduced to a fruitless exercise.'⁸³

At intervals during the 1920s and early 1930s, Schmitt was to play a significant role in the interpretation of pivotal Articles of the Weimar Constitution and the advocacy of executive presidential authority.⁸⁴ His intervention at vital stages arguably paved the way for the full-scale entrenchment of Nazism in 1933. These potent intercessions will be discussed below in the context of Schmitt's bequest to legal and political theory, as embodied in his Weimar texts and applied with shattering implications for the victims of Hitler's Germany. Leaving aside for the moment his distinct legacy to this cursed period of history, this section will endeavour to sketch the contextual socio-political parameters and complex empirical manoeuvrings, within which he was destined to undertake radical re-conceptualisations of '*the pre-constitutional elements of the constitution*',⁸⁵ sovereignty, dictatorship and the utilisation of supervening 'emergency' powers.

Crucial to the viability of the Weimar Republic was its problematic Constitution, intended to cast off the shackles of an authoritarian monarchical system and enable the German Reich to be re-incarnated as both a democracy and a republic.⁸⁶ In contrast, Schmitt grew to perceive the Constitution as '*as attempt to tame the real irrational sources of political power and chain it with legality.*'⁸⁷ The doomed process of forging

⁸³ Agostino Carrino 'Carl Schmitt and European Juridical Science' in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 180, 190.

⁸⁴ Article 48 of the Constitution is especially significant on this point. Schmitt's influence, in this regard, was of real political import towards the end of the Weimar Republic from the period 1930 onwards, though the foundation for his theoretical approach had been developed over several years prior to the collapse of the Republic.

⁸⁵ Ulrich K. Preuss 'Political Order and Democracy: Carl Schmitt and his Influence' in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 154, 158.

⁸⁶ See Ellen Kennedy *Introduction to The Crisis of Parliamentary Democracy* by Carl Schmitt (Cambridge and Massachusetts: MIT Press, 1985) trans. Ellen Kennedy from *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 1923 (Duncker & Humblot, 1926), xx. Kennedy cites Article 1 of the Constitution that reads: 'The German State is a republic. State power comes from the people'.

⁸⁷ *Supra*: Dyzenhaus *Legality and Legitimacy*, 15.

republican-style government in post-WWI Germany began on 19th January 1919 when, by mandate of the electorate, a National Assembly was convened in Weimar amidst considerable political turmoil and bloodshed. Through the draughtsmanship of Hugo Preuss⁸⁸ and Max Weber,⁸⁹ the counsel of Friedrich Neumann and the presidency of Friedrich Ebert, the Assembly finally produced the August 1919 Constitution. It was the selective interpretation and deployment of this document, with the attendant political and juridical controversies embedded in this process that was to prove the source of untold angst during the ensuing years.

Within the nascent Constitution, the Reichstag and the courts constituted two of the five chief organs of state, the remainder being the Cabinet, Federal Council and most momentously the head of state, personified in the President. Elected by the plebiscite for a seven-year term, no embargo upon presidential re-election existed.⁹⁰ From a traditional conservative perspective the executive authority vested in this office counterbalanced what, on this view, was the potential danger associated with parliamentary supremacy, underpinned by an unacceptably left-wing majority. Not only did the President represent the Reich on the international stage⁹¹ but also held wide-ranging municipal powers.⁹² These included the right to dismiss the Chancellor⁹³ and still more portentously to dissolve the Reichstag.⁹⁴ The only caveat to the latter discretion was the nebulous pre-condition that a new election had to be called within 60 days of dissolution of parliament and that such dissolution was permissible only once on the same grounds.⁹⁵ Before implementation of any legislation, the Constitution also conferred upon the President the right to submit proposed statutes to a referendum.⁹⁶ Of crucial significance was Article 48, empowering the President to ‘take measures’ to

⁸⁸ Preuss was the Staatssekretar in the Reich Interior Ministry. To Preuss, there were only 2 alternatives : ‘Either Wilson or Lenin, either the democracy that developed out of the French and American revolutions or the brutal form of Russian fanaticism’: Hugo Preuss, *Staat, Recht und Freiheit* cited *supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy*, xxi.

⁸⁹ ‘Like Preuss, Weber was concerned to forestall the exclusion of the German middle classes from political participation by radical left-wing forces he thought immature and dangerous. Weber’s political theory held up an ideal of rational and competent leadership’: *supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy*, xxii.

⁹⁰ Articles 41, 43.

⁹¹ Article 45.

⁹² Article 46, for example.

⁹³ Article 53.

⁹⁴ Article 25.

⁹⁵ Article 25.

⁹⁶ Article 73, under which action had to be taken within one month of the enactment of a legal provision by the Reichstag.

facilitate the restoration of public order and requiring him to notify parliament of any such ‘measures’ (which the Reichstag could then revoke).⁹⁷ What was fatally unforeseen in 1919 was the latent capacity for the President to circumvent supervision by the Reichstag.⁹⁸ Once the legislative organ could be dissolved at will, the President was potentially imbued with unfettered authority. In all but name, this was dictatorship:

‘In retrospect, when the Weimar Constitution was first framed, the failure to approve the originally conceived provision placing emergency measures of the President under stricter parliamentary control resulted in a large constitutional grey area, a gap, which was now being filled by the precedent of executive authorisation.’⁹⁹

As discussed below, the *Reichspräsident* was to Schmitt the only plausible ‘Guardian of the Constitution’.¹⁰⁰ Was this categorisation, however, merely a euphemism for political authoritarianism?¹⁰¹ On this point, Article 48, with its intrinsic privileging of presidential powers, was to prove empirically fatal to the doctrine of separation of powers that, from a liberal standpoint, was sacrosanct. Whether, from a Schmittian perspective, this comprehensive departure from the *Rechtsstaat* model also entailed an ineluctable and simultaneous abjuration of the *nulla poena* doctrine, textually enshrined in Article 116 of the Constitution, is moot.¹⁰²

Whilst Article 48 was potentially explosive, this provision was not alone in fanning the flames of National Socialism and with it, the attendant annihilation of the ‘rule of law.’ Though many administrative and organisational facets of the Constitution, comprised in

⁹⁷ Article 48 and Schmitt’s interpretation of this provision is dealt with further *infra*: this Chapter.

⁹⁸ Stanley L. Paulson ‘The Theory of Public law in Germany 1914 -1945’ *Oxford Journal of Legal Studies* Vol. 44, (2005), 525: ‘The rub came with the office of the Reich President. Pruess gave the President broad powers, including the power to dissolve Parliament and to issue emergency decrees. He saw the President both as a check on the tendency of the *Länder* to lay claim to sovereignty and, in the transition from a constitutional monarchy to a ‘genuine’ parliamentary democracy, as a counterbalance to the Parliament. But the President’s broad powers lay too heavily in the balance’.

⁹⁹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 157.

¹⁰⁰ Carl Schmitt *Verfassungslehre* (4th edn) (Berlin: Duncker & Humblot, 1928) in Ulrich K. Preuss, ‘Political Order and Democracy: Carl Schmitt and his Influence’ in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 154; Carl Schmitt *Das Reichgericht als Hüter der Verfassung* in *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 139.

¹⁰¹ The extent to which Schmitt’s methodological approach towards the privileging of presidential power is delimited to the specific context of Weimar Germany remains open to argument. Preuss maintains that this methodology accounts for ‘the persistence of Schmitt’s theoretical relevance to any time in history, including our own’: Ulrich K. Preuss ‘Political Order and Democracy: Carl Schmitt and his Influence’ in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 154, 165.

¹⁰² This is discussed *supra*: this Chapter and *infra*: Chapter 5.

its First Part,¹⁰³ were fairly anodyne, Article 76¹⁰⁴ inadvertently provided the final instrument of Hitler's ascendancy to despotic status. This provision was supposedly designed to safeguard the integrity of the Constitution by requiring a two-thirds - that is a higher than the usual fifty per cent - parliamentary majority for any constitutional amendment. Additionally, the Reichstag was deemed quorate on such occasion only when attended by an equivalent proportion of all those entitled to vote. However, as became manifest as the Weimar Republic staggered to its beleaguered conclusion, the drafters of the Constitution had seemingly lacked adequate prescience to fend off those intent on its destruction.

In essence, the constitutional spine of the Republic was disastrously neutral to its own existence¹⁰⁵ and this was a 'failing' that Schmitt would pitilessly come to exploit:

'Maintaining political neutrality towards a political movement whose ultimate objective was the destruction of the legal system was, to Schmitt, suicide'.¹⁰⁶

If the Constitution represented a complicated legal construction and uneasy confusion of powers; a combination of neutral governmental forms and political aims incompatible with one another,¹⁰⁷ this was still more manifest in its Second Part. Here was a guarantee of 'equality before the law',¹⁰⁸ and a parcel of characteristically liberal rights and freedoms¹⁰⁹ conflated with legal recognition of employers' and workers' councils¹¹⁰ and acknowledgment of religious bodies and the role of religion in education.¹¹¹ From the outset, this hotchpotch of conflicting objectives and aspirations, set against the

¹⁰³ Schmitt denounced the First Part of the Constitution as the epitome of value-neutral legality. This is dealt with in connection with his Weimar texts later in this Chapter.

¹⁰⁴ Article 76, which specifically provides that: 'the Constitution may be amended by law', is the subject of a merciless critique by Schmitt in *Legality and Legitimacy* (Durham and London: Duke University Press, 2004).

¹⁰⁵ John P. Mc.Cormick *Introduction to Legality and Legitimacy* by Carl Schmitt (Durham and London: Duke University Press, 2004), xix: 'Schmitt's insistence on ouster of 'equal chance' has led to the question: was Schmitt trying to destroy or save the republic? Schmitt argues that even the most formally neutral constitution cannot be neutral to its own destruction.'

¹⁰⁶ *Supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 13.

¹⁰⁷ *Supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy* by Carl Schmitt (Cambridge and Massachusetts: MIT Press, 1985), xxv.

¹⁰⁸ Article 109.

¹⁰⁹ Article 109: inviolability of personal freedom; Article 114: inviolability of the home; Article 115: privacy of mail, telegraph and telephone; Article 117: freedom of opinion and the press; Article 123: freedom of assembly; Article 124: freedom of association; Article 153: inviolability of private property. Parliament alone was permitted to restrict such freedoms.

¹¹⁰ Article 165.

¹¹¹ Articles 137 and 148.

unresolved antagonism between factions of the right and left, subjected the Republic to fatal stresses. The abiding apprehension confronting those of a staunchly conservative persuasion, like Schmitt, was that the '*combination of party competition and liberal corporatism*'¹¹² embedded in the Constitution was not conducive to the formation of '*democratic accountability for the whole of the political body*',¹¹³ the purported essence of genuine democracy. This professed insistence upon universal responsibility was seemingly, however, little more than a disingenuous facade for preservation of the private property interests they held so dear.

From 1919 to 1924, Article 48 presidential powers were invoked on numerous occasions to quell political revolution and deal with a series of financial crises. A five year period of comparative stability then supplanted the previous upheavals but in conjunction with a world recession, economic catastrophe engulfed Germany in 1929. Raging inflation and mass unemployment ensued, engendering widespread popular disaffection with the existing administration. Through the ballot box, the Nazis strengthened its power base to become the second largest party in the Reichstag. A new Cabinet was put in place by President Hindenburg, hard on the resignation of the Coalition Government in March 1930. This was in response to Hindenburg's refusal to utilise his Article 48 authority to cope adequately with the deepening crisis. In the same month, Heinrich Brüning was appointed Chancellor, where after he repeatedly invoked Article 48 to implement executive measures. Whenever deemed expedient to expunge parliamentary resistance, the Reichstag was summarily dissolved. Over the next 3 years, presidential decrees escalated whilst, conversely, the Reichstag was rarely in session. Subjugation of the legislative wing of the constitution was now virtually institutionalised and authoritarian government became 'the exception' rather than the 'rule'.

In 1932, the Nazis won over a third of the popular vote and shortly afterwards, Hindenburg imposed an emergency ban on Hitler's henchmen, the SS and SA, before dismissing Brüning in May 1932. A general election in July of the same year saw the Nazis and Communists together achieve a majority in the Reichstag. Hindenburg refused to appoint Hitler as Chancellor, insisting that Papen, the incumbent chancellor

¹¹² *Supra*: Preuss 'Political Order and Democracy: Carl Schmitt and his Influence', 154.

¹¹³ *Ibid.*

remain in office. To maintain control, Hindenberg dissolved the Reichstag once again, envisaging this as a permanent step. However, he was compelled to call yet another election in November 1932 to stave off an impending indictment for violation of the Constitution. The Nazis lost ground but remained the largest party. Under intense pressure from the ambitious Hitler, Hindenberg sought to deflect the Nazi bid for power by appointing General Schleicher to the post of chancellor. However, the relationship between Hindenberg and Schleicher foundered when Hindenberg declined the latter's request to dissolve the Reichstag yet again. Aware of manoeuvrings to reinstate Papen as chancellor, Schleicher resigned his position but the situation had already so deteriorated that Hindenberg's presidential authority no longer sufficed to thwart the Nazis. In a successful thrust for dominance, Hitler opportunistically manipulated the Reichstag fire of 27th February 1933 to sign a decree one day later¹¹⁴ that generated '*the reign of arbitrary, unconstrained power that would persist until the end of the war.*'¹¹⁵ Indeed, according to Gerhard Anschutz, '*there can be no doubt that the takeover of power ... was a revolution*'.¹¹⁶

In the wake of the degradation of military and political defeat, the 1919 constitutional aspiration of salving the wounds of a humiliated Germany had ended in ruin. No longer was there any realistic prospect of preserving either a 'rule of law' or indeed 'a rule of the people' in the truly democratic representative sense envisaged in Article 1 of the Constitution. What remained was a distorted and perverted conception of the 'popular will', supposedly encompassed within the person of the Führer. Whether this evolution from liberal democracy to arbitrary despotism could have been pre-empted is moot. A plethora of competing antagonistic groups vying for pre-eminence; economic catastrophe; financial destabilisation; an embryonic and immature liberal constitutionalism; a perceived external threat from Communist Russia: each, in turn,

¹¹⁴ Decree of the President for the Protection of People and State (Decree in regard to the Reichstag Fire) 28th February 1933: the process was completed by the Enabling Act 23rd March 1933. Hitler's acquisition of power is more fully discussed *supra*: Chapter 2. The aforesaid Decree, of 28th February 1933, 'suspended all basic rights indefinitely and served in its practical effect to supplant the Weimar Constitution': *supra*: Paulson, 'The Theory of Public law in Germany 1914 -1945', 525. Notably, however, the Constitution was never legally abrogated. It remained technically in force, albeit in a suspended state, throughout the Nazi era and indeed until the assumption of sovereignty by the Allied Powers at the end of WWII.

¹¹⁵ *Supra*: Dyzenhaus *Legality and Legitimacy*, 27.

¹¹⁶ Gerhard Anschutz *Aus meinem Leben*, Walter Pauly (ed) (Frankfurt: Klostermann, 1993), 6 quoted *supra*: Paulson 'The Theory of Public law in Germany 1914 -1945', 525. The potential significance of the political transition characterising the Nazi rise to power, with particular reference to arguments against the utilisation of retrospective criminal law, is discussed *infra*: Chapter 5.

contributed to the increasing political volatility in a nation still reeling from the mortification of the post-WWI Treaty of Versailles.

Whether Schmitt, legal advisor to both the Papen and Schleicher governments, and arguably '*among the most equivocal and notorious intellectuals of the 20th century*',¹¹⁷ exacerbated or postponed the death of the Republic is discussed below. Did Schmitt ever make a systematic decision upon its preservation or liquidation,¹¹⁸ or was he uncompromisingly jostled by an unprecedented state of concrete disorder to which he believed only an extraordinary response would suffice?¹¹⁹

'We know definitively that he did not decide in favour of such a state (*a volkischer Führer-state*) until March and April 1933 when the die had been cast. Still, it was his decision that threw him into the maelstrom of later moral condemnation: his hectic participation in the Nazi state, the invective he heaped upon emigrants, the scramble for leadership positions, his justification of the Rohm murders, his organisation of the 1936 conference on the 'history of Jewry' on German legal scholarship – all this pursued with the zeal of a convert who senses deep down that he is doing the wrong thing but cannot bring himself to stop.'¹²⁰

If Schmitt's participation in the demise of the Weimar Republic is both perplexing and resistant to analysis¹²¹ - as sporadically is the significance of the role reserved for natural law within his work - less equivocal is the evolution of his legal and political theory as a pliable and, arguably, pragmatic response to a period bedevilled by turmoil:

'Schmitt was aided by a seismographic feel for political processes and intellectual developments that always kept him a bit ahead of his time. His answer to the challenges of the time may be contestable, biased or even reprehensible; however, in the very problems they pose, they reflect the virulence of the time'.¹²²

Pivotal, therefore, to Schmitt are the demands upon the legal order posed by the exigencies of the concrete reality. Equally apparent is that 'positivism' - a brand of

¹¹⁷ *Supra*: Preuss 'Political Order and Democracy: Carl Schmitt and his Influence', 154

¹¹⁸ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 87-100

¹¹⁹ *Ibid*: 225: 'It was never clear whether Schmitt thought that the main danger was from total liquidation or total legalisation of the *status quo*. Perhaps paradoxically, he thought it would be the same'

¹²⁰ Michael Solleis *A History of Public Law in Germany 1914-1945*, trans. Thomas Dunlop (Oxford: Oxford University Press, 2004), 173 quoted *supra*: Paulson, 'The Theory of Public law in Germany 1914-1945', 525.

¹²¹ Gottfried, for example, doubts that Schmitt deemed it acceptable to combine aspects of natural law ideology with his perception of 20th century democracy. See Paul Gottfried *Carl Schmitt Politics and Theory* (New York and London: Greenwood Press, 1990), 4 in which, by reference to various political writers' endeavours to combine faith in democracy, with natural right or natural law states: 'These modern exponents of democracy claim to be restoring some natural fit between democratic and ethical values. Needless to say, Schmitt did not believe it possible to transform modern democracy by grafting 18th century axioms on to its 20th century practice'.

¹²² Volker Neumann 'Introduction to Carl Schmitt' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 287.

jurisprudence that had, in contrast, attained its zenith in an era of economic growth and political stability - is polemically axial to his legal theory. It is with the status of legal positivism in pre-WWI Germany and Schmitt's early writings that the next segment is primarily concerned.

Section 4: the German positivist tradition and Schmitt's early ventures into the realm of legal and political theory

Founded by Carl Friedrich von Gerber and Paul Leband in the 1870s, the positivist school of law introduced an essentially norm-based theory of jurisprudence.¹²³ The intention was to eradicate any trace of natural law language and to entirely excise political and moral commentary from the study of law. Discussions on the origins and moral legitimacy of the legal-constitutional order were therefore foreclosed:¹²⁴

'Beginning with German unification, positivism became the prevailing legal thought, and it remained so for the latter part of the nineteenth century. It signified a departure from the universalism of natural law theory in favour of the idea that law was the creation of the sovereign state.'¹²⁵

Scientific empiricism and materialism had risen to prominence and with it, an accompanying zeal to shed the legacy of '*what had come to be seen by the late 19th century as the chimerical norms of natural law*'.¹²⁶ Law was conceived as nothing other than norm-relations wherein the law unfolds from the highest norm: abstract, general and law-giving, to the lowest: individualised, concrete and executive.¹²⁷ No higher authority than that of the legal norm was recognised, such that universal ethical principles embodied in natural law theories were disregarded, whenever at variance with the legislatively-enacted norm. Perceived as a subordination of all facets of state activity to a system of rational codified legislative norms,¹²⁸ positivism came to be viewed by the academically trained legal establishment as the optimal guarantor of uniformity and predictability in the legal process:¹²⁹

'Parliament produces the statutes interpreted by judges and applied by administrators. Parliament is the prime maker of those legal materials which, according to modern liberal democratic doctrine will generate predictability and regularity within law and limitations on state action'.¹³⁰

¹²³ During the Weimar Republic, the mantle of the Liberal Gerber and the Conservative Leband was assumed by Anschutz, Thoma and Kelsen, all of whom held political positions left of centre.

¹²⁴ *Supra*: Schwab *The Challenge of the Exception*, 49; *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 88.

¹²⁵ *Supra*: Bendersky *Carl Schmitt Theorist for the Reich*, 9.

¹²⁶ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 13.

¹²⁷ Wolfgang Friedmann *Legal Theory* (London: Stevens & Sons Limited, 1953), 118.

¹²⁸ *Supra*: Scheuerman *The End of Law*, 43.

¹²⁹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 14.

¹³⁰ *Supra*: Scheuerman *The End of Law*, 37.

Positivism was therefore intended to create a gapless, closed, seamless web of legal propositions. This ostensibly eradicated discretion from the judicial interpretation and application of law.¹³¹ Essentially, every act of judicial subsumption guaranteed an unassailable and unambiguous decision.¹³² As Schmitt later scathingly observed, *'instead of a jurisprudential education, one applies more pragmatically the technical schooling of a good switchman'*.¹³³ In short, *'the positivist project was to make formal analysis of the meaning of legal terms in statutes the exclusive form of jurisprudence'*.¹³⁴ At the heart of this process was the 'rule of law', characterised by the effective elimination of the personified sovereign (perceived as a politically ungrounded decision)¹³⁵ from the law-giving process. Parliament, with its discursive deliberative role was to be kept distinct from the executive organ of government and parliamentary statutes were privileged in relation to executive decrees and measures:¹³⁶

'Pre-war positivism had held that the universal rights of man defined the limits of state power vis-a-vis private individuals but what the state gave the state could take away, as long as the limitation of such rights was done by legal statute. Trust in the rule of law was so great that legally limiting a basic right was described as the 'concretisation' of that right in legal form.'¹³⁷

At the onset of Schmitt's formative years, the concept of the 'rule of men' was, therefore, seemingly defunct. Positivism witnessed its crowning achievement *'in the turn of the century codification of the German civil law code that provided a convincing demonstration that the totality of private relations could be conceptualised within a self-contained system'*.¹³⁸ Lex had manifestly but ephemerally attained dominance over Rex. This signified to Schmitt what he would come to condemn as *'an antithesis of law*

¹³¹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 145: 'In Weberian terms, positivism stipulates that:

- (i) Every concrete legal decision is the application of an abstract legal proposition to a concrete fact situation
- (ii) It must be possible in every concrete case to derive the decision from abstract legal propositions by means of logic
- (iii) Law must actually or virtually constitute a gapless system of legal propositions or be treated as such
- (iv) Whatever cannot be construed rationally in legal terms is also legally irrelevant
- (v) Every social action of human beings is either an 'application' or 'execution' of legal propositions or as an infringement thereof, since the gaplessness of the legal system must result in the gapless legal ordering of all social action.

¹³² *Supra*: Scheuerman *The End of Law*, 18.

¹³³ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 67.

¹³⁴ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 136.

¹³⁵ *Ibid*: 46.

¹³⁶ *Supra*: Scheuerman *The End of Law*, 142.

¹³⁷ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 161.

¹³⁸ *Ibid*: 14.

and command’; ‘a kind of thought that cannot legally grasp leadership thinking. It demands an oath to the constitution, to the norm instead of to a leader. Its doctrine of separation of powers separates justice and administration’.¹³⁹ Though temporarily triumphant, however, the ‘rule of law’ type state was soon to confront its most dangerous adversary in the Nazis and their ambitious theorist, Carl Schmitt. For a legal system, wherein the sovereign was expelled and the concrete kingly or leadership order effectively destroyed was ultimately to prove one of his principal polemical targets.¹⁴⁰

No one, not least Schmitt, is born into a socio-political vacuum. What arguably distinguishes one human being from the next depends, in part, upon the response of each individual to external influences. How, therefore, was the embryonic Schmitt to react to the climate of unrest and instability, ominously unfolding within early 20th century Germany: either conservative appropriation of his indigenous birthright of legal positivism or radical repudiation of the prevailing positivistic jurisprudential tradition? If the second, what was to take its place - a legal and political system of an entirely new category or revival of a bygone ‘legalitarian order’: revolution or counterrevolution?¹⁴¹ A decade later and to devastating effect, Schmitt was to perfect this latter propensity to ‘play off the ideal against the real without even believing in the ideal’.¹⁴² But which of these potentialities proved the more appealing to the 1910s Schmitt?

His early works lend some insight into aspects of Schmitt’s germinal political and legal constitutional theory that would see their consummation in the conflict-riven Germany

¹³⁹ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 82.

¹⁴⁰ *Ibid*: 56.

¹⁴¹ See *supra*: Schmitt *Political Romanticism*, 62, in which Schmitt explores the concept of history in a revolutionary sense as ‘a revolutionary God that eliminates all social and political boundaries and proclaims the general brotherhood of humanity as a whole’. This, he contrasts with a counterrevolutionary conception of history in which the latter is perceived as a ‘conservative god who restores what the other has revolutionised. It constitutes the general human community as the historically concretised people, which becomes a sociological and historical reality by means of this delimitation and acquires a capacity to produce a particular law and a particular language as the expression of its national spirit’. Unsurprisingly, it is the counterrevolutionary stance that ultimately holds the greater appeal for Schmitt. See also *supra*: Cormick *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology*, 235, where Mc.Cormick posits that ‘the valorisation of Presidential power within the Weimar Republic to combat the legislative power of the Reichstag, gives Schmitt’s constitutionalism not merely a conservatively reactive but an energetically reactionary character’.

¹⁴² *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 26. As will emerge later, Schmitt used this device chiefly against his polemical target, liberalism, specifically in the context of the so-called ‘golden age’ of early 19th century liberal parliamentarianism.

of the ensuing decade and beyond.¹⁴³ Further, his favoured methodological device of locating a specific target, only to berate it with a rapier-like, unrelenting intensity, emerged at a similarly rudimentary stage in his career: '*Schmitt claimed that concepts could only be understood if one knew whom they were aimed against*'.¹⁴⁴ In the early 1920s, this polemical style was to crystallise with icy lucidity. Most notably, the gradual assemblage of an arsenal of conceptual weaponry¹⁴⁵ to inveigh against the fragile Weimar Republic also witnessed its inception in Schmitt's 1910s writings.

Schmitt possessed sufficient perspicacity to deduce that in the years prior to WWI, '*the hegemony of legal positivism was already beginning to fray due to the incursion of new sociological perspectives regarding the relationship between state and society*'.¹⁴⁶ In the early part of the 20th century, the Free Law Movement, a group of politically heterogeneous German jurists under the steerage of Kantorowicz, Ehrlich and Fuchs, made inroads into the vaunted seamlessness of legal positivism. No longer were judges to be treated as automatons, mechanically applying legal norms for the purpose of yielding a technically correct meaning. In practical terms, they were entrusted with a creative role influenced by a range of 'ethical sentiments'. The formalistic conception of law as a completely closed and unified set of norms was outmoded.¹⁴⁷

In his 1912 *Law and Judgment*,¹⁴⁸ Schmitt appropriated but radicalised the Free Law critique of positivism by highlighting what, in his view, was the speciousness of recourse solely to 'the will of the legislator' or 'the will of the statute'. Because of the lack of homogeneity between members of the legislature or judiciary, it was impossible to speak of any collective will. How could a diverse array of individuals plausibly speak with a single voice? Whilst the Free Law movement focussed on a 'moment' of discretion within every judicial decision-making process, Schmitt instead recognised an essential element of indifference in relation to the content of the norm; '*a dimension of adjudication that transcends the previously established norm*'.¹⁴⁹ A legal norm had

¹⁴³ Few of Schmitt's early works have thus far been translated into English. The author therefore relies upon accounts of these writings in the cited sources.

¹⁴⁴ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 24.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 88.

¹⁴⁷ *Supra*: Scheuerman *The End of Law*, 20.

¹⁴⁸ Carl Schmitt (Berlin: Otto Liebmann, 1912).

¹⁴⁹ Richard Wolin 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror' *Political Theory* Vol 20, No.3, August 1992, 424.

utility only insofar as it provided guidance as to the stance likely to be adopted by a hypothetical arbiter, categorised as the empirical type of a modern legally trained jurist:

‘A judicial decision is correct today when it can be assumed that another judge would have decided in the same way.’¹⁵⁰

This emerged as a *‘thoroughgoing denigration of legal normativism’*; a candid recognition that it was not possible to understand the legal order in *‘exclusively rationalist terms, that is, as a self-sufficient set of legal norms after the fashion of legal positivism’*.¹⁵¹ Given that unregulated discretion was a quintessential component within each application of an abstract norm to a concrete fact, problems of indeterminacy could purportedly be averted by treating the hypothetically conjectured approach of another judge as a yardstick of judicial perfection:

‘The normativistic liberal focus on the relation between norm and judge had to be jettisoned for an emphasis on the relation between legal decision makers.’¹⁵²

Presaging his later decisionistic mode of thought, Schmitt therefore privileged the moment of decision in every given case as the bridge between the abstractness of law and the fullness of life; a vital substrate forever opposed to the formalism of law.¹⁵³ Integral to this process was always a *‘measure of irreducible particularity that defies mechanical subsumption under general principles’*.¹⁵⁴

¹⁵⁰ Carl Schmitt *Law and Judgment* (Gesetz und Urteil) (1912), 71, in *supra*: Scheuerman *The End of Law* 19ff; *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 14. Balakrishnan also mentions Schmitt’s 1910 work, *On Guilt and Degrees of Guilt*, in which Schmitt argued that discretionary prerogatives of a judge to determine a sentence highlighted the moment of decision as a free-floating element in the judicial process. It was this theme that he pursued in *Law and Judgment*.

¹⁵¹ *Supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424.

¹⁵² *Supra*: Scheuerman *The End of Law*, 21. Schmitt seemed to believe that this relationship would constrain any potential consequential indeterminacy within the application of law. However, see *ibid*: 97: ‘Early in Schmitt’s career, he suggested that the moment of arbitrary decision was containable by judges able to secure legal predictability and regularity even in the face of the impossibility of binding state action to clear norms. By the early 1930s, the moment of arbitrary decision escapes even over these early modest limits.’ By 1933, however, Schmitt had come to formulate what he deemed an appropriate solution to the possible inadequacies of judicial application in his un-translated work: *‘State, Movement, People’*. Citing from this work, *ibid*: it is clear that homogeneity is, to Schmitt, an almost sinister curative factor to the problems of legal indeterminacy: ‘It is an epistemological verity that only those are capable of seeing the facts of a case the right way, listening to statements rightly, understanding words correctly and evaluating impressions of persons and events rightly, if they are participants in a racially determined type of legal community to which they existentially belong’.

¹⁵³ *Supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424.

¹⁵⁴ *Supra*: Wolin ‘Carl Schmitt, political existentialism and the total state’, *Theory and Society* Vol. 19 (1990), 389-416: ‘It should be noted however, that Schmitt’s apparent predilection for judicial discretion

At this early stage, it is clear that Schmitt was polemically opposed to the cornerstone of positivism wherein the legal order was allegedly fulfilled and conceptualised in the notion of a closed system of norms. But he did not yet take specific issue with the notion that valid law comprised only that embodied in properly-enacted statute, again one of the hallmarks of positivism. To this extent, Schmitt attempted to '*mediate between the irrational position of sheer judicial prerogative and the hyperrational position of legal formalism*'.¹⁵⁵ The fundamental point at which, in 1912, Schmitt differed from traditional positivism was in the translation of the norm from law-making to law-application. Whereas to positivists, this was a purely mechanical process, to Schmitt the 'decision' was indispensable. But natural law was not affirmed as the basis for this discretion. Rather, it was seemingly governed by reference and in response to the exigencies of the 'concrete' situation; nowhere did Schmitt hint that the decision was valid only when congruent with universal principles of ethical rectitude or divine providence.

However, two years later, in *Value of the State and Significance of the Individual*,¹⁵⁶ Schmitt did appear to express a transient sympathy for a type of neo-Thomist natural law, a 'higher law' which the state had a duty to realise in the form of positive law.¹⁵⁷ Yet, this 'higher law' was indeterminate in provenance and never fully defined. It remained conceptually vague,¹⁵⁸ perhaps imbuing the State with '*a kind of supernatural legitimation*'.¹⁵⁹ Hence, it could not be readily equated with the moral precepts of the Catholic, or indeed any other traditional natural law position. Nor was it positivist in

was later, if perhaps expediently and opportunistically modified during his debate with Hans Kelsen regarding the 'Guardian of the Constitution'. In his 1929 '*Das Reichsgericht als Der Hüter der Verfassung*', Schmitt asserted that a Constitutional Court was incapable of fulfilling this role. He argued that the judicial function was limited to situations where 'subsumption' was possible; that subsumption was feasible only where the legal norm was neither 'doubtful' nor 'controversial'; that the court could therefore only permissibly arbitrate on questions of fact and that therefore the very concept of a constitutional court entrusted with determination of issues of law, was misplaced. For a further account of Schmitt's ostensible *volte-face* in the context of judicial discretion, see *supra*: Paulson 'The Theory of Public law in Germany 1914 -1945', 525.

¹⁵⁵ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 211.

¹⁵⁶ Carl Schmitt *Der Wert des Staates und die Bedeutung des Einzelnen* (Tubingen, 1914).

¹⁵⁷ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 15.

¹⁵⁸ *Supra*: Bendersky *Carl Schmitt: Theorist for the Reich*, 10.

¹⁵⁹ Peter Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism* (Durham and London: Duke University Press, 1997), 202, n.70, where Caldwell posits that Schmitt is relying here not on traditional Catholic or classic natural law theory; also *ibid.* 53, to the effect that Schmitt, at this stage, conceived 'law' as a 'natural law without naturalism, originary and outside the state'. It was effectively therefore this element on which positive legal norms rested.

conception.¹⁶⁰ From this latter perspective, no other law was recognised save those norms created by the State. Right did not precede the State but rather was created or ‘given’ by it. Against positivism, Neo-Kantian jurists - amongst them Rudolf Stammler – had, by the beginning of the 20th century, posited the existence of some ‘pre-state right’ of undetermined provenance, to which the positive law of a state was required to conform. Similarly but ephemerally, Schmitt was to embrace this unspecified pre-state notion of ‘right’:

‘Neo-Kantianism offered Schmitt a means of harmonising the dichotomous sympathies he felt as a German nationalist and as a catholic. The dictates of universal moral principles could be reconciled with the power of the state; morality and power, religious conviction and nationalism could be harmoniously integrated.’¹⁶¹

Nor was Schmitt disposed to permit his sovereign to enjoy pre-eminence over positive law. Perceived as the embodiment of law rather than a transcendent entity, sovereign power was accordingly ‘*no more above the law than above grammar.*’¹⁶² Schmitt then reined in sovereign authority still further, by arguably imbuing the sovereign with some form of intrinsic quasi-moralistic ideology. On this interpretation, the sovereign was equivalent ‘*to the theological God whose omnipotent will cannot desire anything bad or irrational.*’¹⁶³ If the antithesis of ‘bad’ is ‘good’, then the conduct of the sovereign was commensurately controlled by some benevolent and sagacious self-restraint. A sovereign, thus constrained both immanently and transcendentally, confined at best to parity with positively-given law, potentially produced an outcome ripe for the total subsumption of sovereign authority within the legal system. Indeed, aside from Schmitt’s tentative and non-positivistic reliance upon a dualistic conception of law, whereby the state-propagated norm was notionally subjugated to a nebulous *a priori*

¹⁶⁰ See *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology*, 42 on Schmitt’s resistance, even at an early stage in his career, to purely rational and instrumental thought, in his view, typified by modernity: ‘What most disturbs Schmitt about the way of thinking that characterises modernity is a blind domination of nature and what has become to be called “instrumental rationality”; “functional means towards a “senseless purpose”’.

¹⁶¹ *Supra*: Bendersky *Carl Schmitt: Theorist for the Reich*, 10. ‘Schmitt refuted neo-Kantianism and normativism in the 1920s and 1930s in favour of decisionism’; *supra*: Schwab *The Challenge of the Exception*, 14.

¹⁶² Carl Schmitt *Der Wert des Staates und die Bedeutung des Einzelnen* (Tubingen, 1914), 95 in Agostino Carrino ‘Carl Schmitt and European Juridical Science’ in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 180, 193, n.27.

¹⁶³ *Ibid.*

code of rectitude,¹⁶⁴ his burgeoning theory seemingly bore the principal characteristics of legal positivism.

However, this depicts only one portion of the canvas upon which Schmitt was beginning to sketch his politico-legal picture. Significantly, the 1914-Schmitt was also beginning to contemplate the fundamental nature of 'law' and its interrelationship with power. Reminiscent of Kelsen, law and power were deemed to exist as discrete spheres.¹⁶⁵ Within a Schmittian worldview, legally unregulated power polluted the purity of law and the prospect of '*any gradual transition from the norm to the will was unthinkable*'.¹⁶⁶ But to Schmitt (unlike Kelsen), this antinomy between law and power was supposedly bridged by the actions of state organs, whether executive, administrative or bureaucratic, in a moment of '*normatively unregulated facticity, of pure power or wilfulness*'.¹⁶⁷ Despite the existence of some undefined 'higher law', no law prior to the state was capable of self-legitimation. Further, even the state-promulgated norm remained abstruse and free-floating until the moment of concrete application:

'Between every abstraction and every concretion lies an unbridgeable gap. Positive law [must know] that law is concretised in a judgment, not in a norm.'¹⁶⁸

The feasibility of actual deployment of the norm comprised an indispensable precondition to its validity. Thus, law had to pass through the state as a '*medium in which it undergoes a specific modification*'.¹⁶⁹ Here was the essence of transformation from abstract norm to concrete facticity. The state acted as a '*transmission belt*',¹⁷⁰ as '*ultimate arbiter over questions of concrete indifference*'.¹⁷¹ This incipient privileging of the decision, the primacy of the 'pure political will', meant that positivism would

¹⁶⁴ This was an aspect of Schmitt's theory promptly jettisoned in this form, in the early 1920s, though the question of legitimacy for an entire legal system continued to vex Schmitt, long after he purported to reject any conception of a 'higher law' pre-dating positively-given law..

¹⁶⁵ Indeed, according to Peter Caldwell in *supra: Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 201, n.62, Schmitt, in *Die Diktatur*, originally written in 1921, 3rd edn. (Berlin: Duncker and Humblot, 1964), xix-xx, 'flatly denies the relationship between law and power' as well as separating law from 'will, ethics and substantial goals'

¹⁶⁶ *Supra: Scheuerman The End of Law*, 24.

¹⁶⁷ *Ibid: 25*

¹⁶⁸ Carl Schmitt *Der Wert des Staates und die Bedeutung des Einzelnen* (Tubingen, 1914), 79 in John Mc.Cormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 220.

¹⁶⁹ *Supra: Wolin 'Carl Schmitt, political existentialism and the total state'*, 389-416.

¹⁷⁰ *Supra: Scheuerman The End of Law*, 25.

¹⁷¹ *Supra: Wolin 'Carl Schmitt, political existentialism and the total state'*, 389-416.

never again, for Schmitt, represent a coherent jurisprudential method.¹⁷² The over-reliance on the cogency of the norm and the postulated redundancy of the untrammelled decision, underlined the delinquency of a system where the norm was magically - but in Schmitt's view, nonsensically - somehow capable of self-realisation. 'Gaps' in the law were to be celebrated rather than subjected to theoretical evaluation and 'remedy'.¹⁷³ In essence, because '*one law cannot protect another law: only men can be the interpreters and defenders of the law*',¹⁷⁴ the omniscient sovereign, unfettered either by 'higher law' or the positive legal norm, was ultimately the only viable mode of governance.

If Schmitt was already displaying this incipient deviation from the fundamental precepts of legal positivism, he was also ruthlessly prepared to subjugate the individual to state authority. Nor was he prepared to recognise the reality of the subjection this entailed:

'Law and the state are no more based on human autonomy than the sun is defined as a fire kindled by freezing primitives to warm themselves.'¹⁷⁵

Were it to brook opposition or rebellion, the state would be unable to adequately fulfil its discretionary prerogatives. The traditional liberal ethos of individualistic rights constituted a dispensable luxury, ill-befitting Schmitt's germinal construction of an effective politico-legal system:

'No individual can have autonomy within the state. The individual is merely a means to the essence; the state is what is most important.'¹⁷⁶

¹⁷² See *supra*: Scheuerman *The End of Law*, 25 where Scheuerman posits that, even at this stage, Schmitt was attempting the impossible: the mixing of immiscible substances, as with oil and water. 'Law' and 'power' occupy separate discrete zones and cannot be linked in the manner Schmitt suggests: 'Schmitt polemicalizes against power-realist interpretations of law but, in part, at least succumbs to it and as such ends up privileging pure unregulated power.' To Scheuerman, this is the inevitable consequence of Schmitt's insistence upon forcing 'law' to make concessions to power and in the process, causing law to 'compromise its normative virginity': *ibid*: 25.

¹⁷³ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 212.

¹⁷⁴ Carl Schmitt *Der Wert des Staates und die Bedeutung des Einzelnen* (Tubingen, 1914), 83 in *supra*: Schmitt *On the Three Types of Juristic Thought*, 22; *supra*: Scheuerman *The End of Law*, 25: to Schmitt, 'if law is to be effective, it cannot remain normatively pure'.

¹⁷⁵ Carl Schmitt *Der Wert des Staates und die Bedeutung des Einzelnen* (Tubingen, 1914), 93 quoted in Volker Neumann 'Introduction to Carl Schmitt' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 284.

¹⁷⁶ See *supra*: Wolin, 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', 424-447. See also Gary Ulmen *Introduction to Schmitt's Roman Catholicism and Political Form* (Westport: Greenwood Press), 1996, xxx, n.16; here Ulmen refers to Schmitt's discussion of the individual in *Der Wert des Staates und die Bedeutung des Einzelnen*: 'Where 'the individual disappears as an empirical identity when considered from the standpoint of law and the task of the state to realise law. If there is autonomy in law, then only the state can be the subject of ethos in law'.

Abnegation of individual rights was arguably irreconcilable with Schmitt's early Neo-Kantianism. Unsurprisingly, therefore, the latter was subsequently jettisoned as was his conception of the enforced subjugation/parity of the sovereign to 'higher' and positive law respectively.¹⁷⁷ The notion of a pre-ordained 'moral' code, elemental within the sovereign authority, was similarly evanescent.¹⁷⁸ What then of the remainder of Schmitt's 1910s themes: the pivotal role of the state in transforming normativity to facticity; the concrete moment of indifference to the content of the norm and most notably, the as yet under-developed primacy of the 'decision'? These arguably comprised the seminal ingredients for the supremacy of unbridled, arbitrary discretion: pure power unrestrained by legal norms. All were harbingers of the decisionist theory promulgated by Schmitt in the 1920s; equally, all seemingly distanced Schmitt from the positivist tradition into which he was born. Ostensibly disenchanted with a positivistic mode of jurisprudential thought, revolution was still more antithetical to Schmitt's inherent conservatism. Instead, he sought to resurrect the puissant state authoritarianism conceived by Hobbes over three centuries before Schmitt's birth. This was destined to furnish the putative ammunition to launch a sustained invective against legal positivism¹⁷⁹ and, in particular, Kelsen's will-less norm.¹⁸⁰ Selected, albeit radicalised, aspects of a distinctly Hobbesian political philosophy were thenceforth to infuse Schmitt's writings and it is upon Thomas Hobbes, that the ensuing segment chiefly focuses.

¹⁷⁷ See *infra*: this Chapter for discussion of Schmitt's apparent negation of 'individual rights'.

¹⁷⁸ 'Moral' here is used in the sense of 'good', that is, the antithesis of 'bad'.

¹⁷⁹ See Peter Caldwell 'Legal Positivism and Weimar Democracy' *The American Journal of Jurisprudence* Vol. 88, (1994), 273- 301, for a challenge to what Caldwell terms 'the typical' story of the positivist legal theory which came to dominate German jurisprudence in the early part of the 20th century. According to the usual narrative, with which Caldwell takes issue, positivism represented a mode of jurisprudential thought by which law was divorced from 'ethical, political or historical considerations'. In turn, this supposedly rendered the law defenceless and powerless against any unlawfulness in the form of a statute: 'the adherents to this theory were compelled to recognise every unjust statute as law'. In contrast, Caldwell argues that positivism provided a 'pro-democratic function within the Republic' and, further, that positivism is able to respond to the individual context in which it is set and constitute 'a juristic response to a concrete political situation'. What he is compelled to acknowledge however is that positivism, within Weimar Germany, only comprised an effective 'bulwark against fascism', rather than its 'handmaiden', as long as the Weimar Constitution remained valid. Thus, 'this blind spot regarding the crisis of the political order' is unresolved.

¹⁸⁰ Hermann Heller 'The Essence and Structure of the State' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 277: 'According to "pure normativism" represented by Kelsen and his school, the basis is supposed to be the basic norm representing "the logical origin of the constitution which, as a legal hypothesis, puts into place the "constitution-giving authority"; the constitution therefore is supposed to get its "legally" relevant validity from this norm of origin and its content from the empirical act of will of the constituting authority. Schmitt confronts this power-less, merely logical norm which is not legally valid, with the norm-less will which is not valid at all'; on this point, see also *supra*: Scheuerman *The End of Law*, 73.

Section 5: The enigma of Thomas Hobbes (1588-1679): a political theorist belonging *de facto* to the history of the natural law tradition and *de jure* to the history of legal positivism¹⁸¹

‘It is no small matter to try to understand a thinker of such an age better than he understood himself.’¹⁸²

An overview

During the Weimar period, Schmitt feted Thomas Hobbes as ‘*truly a powerful and systematic thinker*’, for whom ‘*the pessimistic conception of man is the elementary presupposition of a specific system of political thought*’.¹⁸³ The validity of this assertion is explored below, as is later, the extent to which Schmitt’s own political system is thereby overtly or implicitly influenced, both generically and, in the specific context of retrospectivity. Beyond doubt is that Schmitt updated and continued a series of Hobbesian themes within a 20th century context¹⁸⁴ and it was Schmitt himself who devoted an entire monograph to a scrutiny of Hobbes’ leviathan state.¹⁸⁵ Is it perhaps feasible, therefore, to regard Schmitt as a latter day representative of the Hobbesian tradition, if a somewhat deviant one, who disables the natural law aspects of his precursor’s theoretical position whilst emphasizing the oblique correlation between the ‘state of nature’ and the ‘political’?

What follows does not, therefore, purport to provide a comprehensive account of the political and moral philosophy of Thomas Hobbes. Rather, it seeks to explain, in skeletal and, in part, dialogic form, why the theories of one man have simultaneously succumbed to appropriation by those of both a natural law and positivistic persuasion; indeed ironically by Schmitt himself who professes no particular adherence to either. Specifically, it will inquire whether an irreconcilable paradox exists within a

¹⁸¹ Norberto Bobbio *Thomas Hobbes and the Natural Law Tradition* (Chicago: Chicago University Press, 1993), 114.

¹⁸² Carl Schmitt ‘Die Vollendete Reformation: Bemerkungen und Hindweise zu neuen Leviathan-Interpretationen’, *Der Staat* 4 (1965), 51, 57 in Gershon Weiler *From Absolutism to Totalitarianism* (Durango, Colorado: Hollowbrook Publishing, 1994), 153.

¹⁸³ Carl Schmitt *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. by George Schwab from *Der Begriff des Politischen*, 1932 edition (Berlin: Duncker & Humblot, 1932), 65.

¹⁸⁴ See for example Joseph W Bendersky ‘Schmitt and Hobbes’ *TELOS* No. 109, (Fall 1996), 122-131; Johan Tralau *Thomas Hobbes and Carl Schmitt* (London: Routledge Press, 2010).

¹⁸⁵ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*.

construction of the state doctrinally underpinned, on a Hobbesian analysis, by *natural law*, whilst also arguably comprising seminal ingredients of modern *legal positivism*. If these two jurisprudential traditions are conceded to engage in an unremitting polemical antithesis where each strives to negate the other, how is it feasible for Hobbes to constitute the repository of both? Most pertinently, does this ostensible ambivalence unmask possible misinterpretations of what, at first blush, might be deemed an unequivocal repudiation of retrospectively applied criminal law? Is it the natural law aspects of Hobbesian theory that offer support for a constitutional ban on retrospectivity and are these sacrificed within its Schmittian counterpart, which appears to abandon reliance on natural law in favour of a radicalised critique of Kelsenian positivism?

In truncated but vastly over-simplified form, Hobbes reputedly subscribes to the tenet that, ‘*no law made after a fact done, can make it a crime*’.¹⁸⁶ As will emerge, however, this accurate but partial extract represents only one facet of an infinitely more complex conundrum. The enigma, in its entirety, becomes discernible and indeed solvable only through the ensuing extrapolation of the warp and weft of natural law and positivist tendencies interwoven by Hobbes in his artful production of a political theory, both innovative and unique. In short, is Hobbes a rigorous theorist of the position wherein all law is reduced to an act of sovereign command – a significant hallmark of legal positivism - or does he remain entrenched in the natural law tradition into which he was born? Adherence to the latter would connote a system where natural and positive laws co-exist in uneasy juxtaposition, positively-promulgated norms being invalid unless compliant with the maxims embedded within a natural law ideology:

‘One of the salient and typical features of traditional natural law theory is the thesis that a positive law is valid only if it conforms to the law of nature. In St Thomas’s famous words: “*there does not seem to be a law which is not just, for insofar as it participates in justice, it also participates in virtue*”.’¹⁸⁷

Brief consideration of the prevailing unrest within the England of the 17th century is an empirical pre-requisite to elucidation of this immanent contradiction.¹⁸⁸ As with

¹⁸⁶ Thomas Hobbes *The Leviathan* (New York: Prometheus Books, 1988), Part II, Ch. 27, 155.

¹⁸⁷ ‘*Summa Theologica*, I, II, q. 95, art.2 in *supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 164.

¹⁸⁸ Jeffrey Seitzer ‘Carl Schmitt’s Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis’, *Canadian Journal of Law and Jurisprudence*, Vol. 10, No. 1 (January 1997), 203-224: ‘Hobbes must be understood in reference to the struggle against traditional authority. In 17th century England, the individual was caught in the cross-fire between rival powers. In

Schmitt, historical events were destined to furnish a potent catalyst for Hobbes' political philosophy.¹⁸⁹ Indeed, armed antagonisms of the type emergent within Weimar Germany were strangely reminiscent of the violent factionalism existing in Hobbes' day.¹⁹⁰ Any juridical tensions, jostling for supremacy within his writings, similarly crave contextualisation. As will emerge, Hobbes like Schmitt was obsessed both with the establishment and preservation of unity against anarchy,¹⁹¹ and the disorder that inevitably accompanies the dissolution of authority.¹⁹² Indeed, this abiding terror was to prove a significant component in his synthesis of '*the first fully conscious representation of the rise of the centralised state*', characterised by '*monopolisation of law by the state*'.¹⁹³ No role was assigned, in Hobbes' system, either to the conception of mixed government of the constitutional variety or, in the main, to a concomitant recognition of the rights of the individual against the state.¹⁹⁴ Such checks and balances upon governmental authority were destructive of order and, to Hobbes, this was anathema.¹⁹⁵ Though he asserted the supremacy of the state arguably only to the least extent required to curtail the worst instincts of disorder,¹⁹⁶ the instillation of order was to remain of paramount importance.¹⁹⁷

If the experiences garnered from '*an age of ferocious and prolonged civil war*',¹⁹⁸ explain this insatiable quest for a more tranquil condition it is, however, in Hobbes' writings that his aspirations for a more commodious existence ultimately attain

response, Hobbes sought to centralise authority and make its legitimacy contingent upon the protection of the individual. This also explains Hobbes' reliance on reason as a restraint on sovereign power. The religious wars of the 17th century were fuelled by superstition and prejudice. Hobbes sought to counter this by insisting on the capacity of reason to provide a workable basis for a peaceful order'.

¹⁸⁹ Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* trans. and annotated by G.L. Ulmen (New York: Telos Press Ltd.): 'Hobbes can, historically speaking be understood only in terms of his times'.

¹⁹⁰ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 255.

¹⁹¹ *Supra*: Gottfried *Carl Schmitt Politics and Theory*, 28: 'Among the reasons given for his profound respect for Bodin and Hobbes, Schmitt lists first their experience of and reasoned response to civil war'; cf. Stephen Holmes *The Anatomy of Antiliberalism* (Cambridge, Massachusetts and London: Harvard University Press, 1996), 41 where Holmes indicates that 'Schmitt is more concerned with the greatness of Germany than the maintenance of order *per se*'.

¹⁹² *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 27.

¹⁹³ *Ibid*: Bobbio, 217.

¹⁹⁴ This point is discussed *infra*: Section 6. As will emerge, Hobbes does purport to allow the individual some residual rights against the state but, due to the logical rigour and ingenuity of his political philosophy, these are arguably of little practical significance.

¹⁹⁵ *Supra*: Weiler *From Absolutism to Totalitarianism*, 118.

¹⁹⁶ *Ibid*: 47.

¹⁹⁷ See *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 21, in which Schmitt endorsed Hobbes' insistence upon order, 'the absolutism of the state is accordingly the oppressor of the irrepressible chaos inherent in man'.

¹⁹⁸ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 198.

theoretical fruition. A degree of exegetical analysis is therefore crucial and though other major works emerged between 1640 and 1670,¹⁹⁹ the English version of *Leviathan* is generally deemed the ‘*most complete and reliable version of his theory*’.²⁰⁰ Pivotal elements of this text are examined below but are prefaced by a brief visit to the era of intense strife that was to influence Hobbes’ perception of Man and the sovereign state.

¹⁹⁹ *Elements of Law, Natural and Politic*, (1640); *De Corpore, De Homine, De Cive* (1642) (first private edition); *De Cive* (1647) (first published edition); *De Corpore Politico* (1650); *Leviathan* (1651), English edition; *A Dialogue between a Philosopher and a Student of the Common Law of England* (1666); *Leviathan* (1670), Latin edition, probably written in part before the English edition; *Behemoth: The History of Causes of the Civil Wars of England*

²⁰⁰ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 27

A life in the shadow of turmoil

Thomas Hobbes was born into Tudor England, in 1588, at the acme of the Elizabethan age, overseen by a monarch who, by sheer force of intellect, magnetism of personality and unwavering conviction in the utility of peace, arguably epitomised the most laudable aspects of authoritarian rule.²⁰¹ Elizabeth I was, however, the possessor of manifold attributes regrettably beyond emulation, either by her Stuart successor, James I, strident advocate of the Divine Right of Kings,²⁰² or his son, Charles I.²⁰³ Their successive disinclination to compromise with the forces of parliamentarianism instigated the inexorable descent into the devastation of the English Civil War (1642-49):

‘The opposition to the Crown was destined to break out openly under the successor to James I, Charles I, whose reign was an uninterrupted history of dissensions which grew increasingly irreconcilable between Crown and Parliament. The Crown insistently and, at times unskillfully, asserted its prerogatives which clashed with parliamentary demands, especially in religious, financial and international matters’.²⁰⁴

This cataclysmic rift between the English Crown and Parliament occurred against the backdrop of an equally horrific battleground: the Thirty Years War, an intensely contested religion-engendered conflict, on this occasion, involving protagonists from mainland Europe. Hobbes therefore bore witness, both at home and abroad, to the mayhem flowing from divided rule, whether amongst vying secular institutions or between temporal and spiritual regimes competing for pre-eminence. Though never actively engaged in politics, these were experiences he deeply imbibed. The devastating impact of civil war, coupled with the ubiquitous sceptre of renewed discord, was to infuse Hobbes’ subsequent works. Influenced more profoundly by the conflagration raging around him, than the serenity of a domestic domain spent chiefly in the service of the aristocratic Cavendish family,²⁰⁵ Hobbes remained haunted by the ever-present fear of disorder. This was conceivably intensified during a period of eleven years voluntary exile in France, his elective refuge from the perils of potential persecution,

²⁰¹ Keekok Lee *The Legal-Rational State* (Aldershot: Gower Publishing Company, 1990), 68: ‘Sovereignty really started in Tudor England. The Crown could make new laws which could erode custom, traditional moral law and natural law. In reality, sovereign-made law was superior to the community’s law’.

²⁰² As will become apparent, Hobbes had no use for the Divine Right of Kings; on this point see *ibid*: 59.

²⁰³ Charles I was executed in 1649, an act of regicide that had an indelible impact upon Hobbes.

²⁰⁴ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 82.

²⁰⁵ During his earlier years of service, he was able to visit continental Europe on three occasions for study purposes, on these trips meeting both Galileo and Descartes. He gradually rose from service, to the role of tutor and later guest of the Duke of Devonshire.

precipitated by the circulation of his pro-monarchical tract, *Elements of Law, Natural and Politic* in 1640.²⁰⁶

Ostensibly reassured by the promise of peaceful co-existence at the conclusion of the Civil War, Hobbes was content to return to England in 1651. A further nine years were to elapse before the monarchical Restoration of 1660, thus ending England's short-lived and solitary dalliance with republicanism. Hobbes had been sufficiently astute never to exaggerate his allegiance to either the Royalist or Republican cause and this overt ambivalence rendered him acceptable to both.²⁰⁷ At heart, however, he seemingly '*never ceased to respect the English monarchy or to admire the monarchical form of government to which he remained faithful his entire life*'.²⁰⁸ But even had the parliamentarians retained control, Hobbes was no revanchist ideologue. Conservative in inclination, his primary allegiance was not to the maintenance of the status quo *per se* but to the institution of any socio-political system wherein the feasibility of chaos was marginalised. Pragmatic by instinct and utilitarian by intellect, it is in his *Leviathan* (1651) that he went on to perfect his construct of the modern state. For Hobbes, this was a process laden with various elements synonymous with a still undeveloped legal positivism, yet at the same time fundamentally dependent upon tenets of natural law. Positivistic proclivities laced with traditional natural law affinities; a combustible cocktail of antagonistic ingredients, carefully interwoven in a consuming demand for the peace and security, of which Hobbes deemed a 'strong' state the sole effective guarantor.

²⁰⁶ During this period of 'exile', Hobbes mingled with the scientific intelligentsia of Europe and from 1646, also acted as tutor of mathematics to the future Charles II of England, then Prince of Wales, who had also fled to France for his own safety.

²⁰⁷ Mc.Cormick posits that the abstract individualism of Hobbes' political theory: 'points up his ultimate agnosticism in respect of the combatants in the Civil War. His *Leviathan* was written for the most part in support of the King but was easily inverted by Hobbes into his a justification for Cromwell': John P. Mc.Cormick 'Fear, Technology and the State', *Political Theory* Vol. 22 No.4, (November 1994), 619, 640.

²⁰⁸ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 204.

***Leviathan*: averting an apocalypse**

‘Hobbes and only Hobbes is the initiator of modern natural law theory. Nonetheless, there is an interpretation of his thought and position in the history of legal theory which considers him to be the precursor of modern positivism.’²⁰⁹

Negating the state of nature and the ‘Laws of Nature’

The starting point of Hobbes’ political philosophy of the state is his anthropological pessimism about the basic nature of Man. In no sense does this imply, however, that all men are, without qualification, inherently bad.²¹⁰ Rather, each human being is imbued with an entire gamut of vices and virtues, collectively categorised as Passions. Amongst these innate characteristics are hate, love, contempt, avarice, diffidence, vainglory and pleasure, as well as good and evil.²¹¹ Each conscious act of Will is immediately preceded by one such appetite or aversion²¹² and crucially, all Passion is ultimately reducible to an unquenchable thirst for power.²¹³ It is competition for all things that inclines men to contention and enmity in the state of nature, culminating in the ‘*war of all against all*’.²¹⁴ In this condition, all men are equal in their innate capacity to kill²¹⁵ given that, in opportune circumstances, the weak are able to eliminate the strong:

‘From this equality of ability arises equality of hope in the attaining of our ends. If two men desire the same thing which they cannot both enjoy, they become enemies and in the same way, endeavour to destroy or subdue one another.’²¹⁶

Human beings are consigned in the state of nature, that is, the pre-state condition, to ‘*continual fear and danger of violent death and the life of Man, solitary, poor, nasty,*

²⁰⁹ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 155; *supra*: Lee *The Legal-Rational State*, 73: ‘Hobbes was the first legal positivist in the history of western jurisprudential thought’.

²¹⁰ Leo Strauss ‘On the Basis of Hobbes’ Political Philosophy’ in ‘*What is Political Philosophy?*’ (Glencoe, Free Press, 1959), 178-179: Strauss posits that Hobbes held a natural pessimistic view of humanity as dangerous and dynamic but also held a more problematical, and unnatural view of humanity as educable, prudent and capable of self-control for the sake of rational self-interest. He indicates that direct domination would have been preferable rather than Hobbes’ offer to Man of the promise of a more commodious life. Hobbes privileged ‘reason’ but in Strauss’ view, it is precisely the continued existence of subjective reason pursued towards private ends within civil society that will undermine Hobbes’ state. This was also a theme emblematic of Schmitt’s attitude towards Hobbes. *Ibid*: 9: Hobbes’ concept of reason ‘makes men more and not less dangerous and therefore in still more need of being ruled.’ *Ibid*: 29: ‘Hobbes political philosophy is based upon first hand experience of human life’.

²¹¹ Thomas Hobbes *The Leviathan* (New York: Prometheus Books, 1988), Part I Ch.6, 23ff.

²¹² *Ibid*: Part I Ch.6, 28.

²¹³ *Ibid*: Part I Ch.8, 35.

²¹⁴ *Ibid*: Part I Ch.11, 50. The state of war, in which every individual is the foe and competitor of everyone else, is often known as *bellum omnium contra omnes*. According to Schmitt in his *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 31, ‘Hobbes appropriated the formula of Francis Bacon of Verulam by speaking of man becoming God to Man (*homo homini deus*), whereas in the state of nature, Man was wolf to Man (*homo homini lupus*)’.

²¹⁵ *Supra*: Hobbes *The Leviathan*, Part I Ch.13, 63.

²¹⁶ *Ibid*: Part I Ch.13, 63.

brutish and short'.²¹⁷ In this dreadful fear of death, Hobbes recognises '*something vital, substantive and fundamentally human*'.²¹⁸ Whether the natural condition of mankind is a purely rhetorical device; an allusion to some obsolescent bygone age or more likely, the ever-present possibility of chaos in contemporary life (represented most vividly by civil war),²¹⁹ Hobbes cannot countenance the perpetuation of a state where misery and desolation abound:²²⁰

'His state of nature is a 'no-man's land' but this does mean that it exists 'nowhere'. It can be located and Hobbes locates it in the New World. In *Leviathan*, 'the Americans' are an example of the 'wolf-character' of men in the state of nature. In the latter stages of Hobbes' intellectual development, the elaboration of concepts takes precedence over concrete experiences in time and space. The state of nature is treated less as a historical fact and more as a hypothetical construct.'²²¹

In contrast to a wretched existence bedevilled by war or the known disposition to it, lies the comparative sanctuary afforded by Peace.²²² The state of nature knows of no propriety or dominion; no justice or injustice. Notions of right and wrong are confined to society, and do not pervade the anarchic solitude where cognition is accorded only to the '*cardinal virtues of force and fraud*'.²²³ Without laws to prohibit or sanction men's actions,²²⁴ sin in the sense of punishable crime does not exist. Chaos inexorably ensues. Man yearns to escape from this invidious state and it is the nucleus of reason embedded within each individual that urges the quest for a more stable condition, conducive to the fulfilment of self- preservation.²²⁵ Though seemingly contradictory, passion and reason are not mutually exclusive in that each individual is seemingly capable of embracing both. Man may be inherently dangerous and dynamic but the residuum of reason and intelligence embedded within each individual enables him to overcome his innate rebelliousness and obstinacy.²²⁶ But does not an immanent contradiction exist in any

²¹⁷ *Ibid*: Part I Ch.13, 65.

²¹⁸ *Supra*: Mc.Cormick 'Fear, Technology and the State', 619, 620.

²¹⁹ *Ibid*.

²²⁰ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 41- 42: 'According to Hobbes, the state of nature can come into existence in three specific situations which are historically verifiable: primitive (pre-political) societies, civil war and in international society'.

²²¹ Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* trans and annotated by G.L. Ulmen (New York: Telos Press Ltd.), 9.5

²²² *Supra*: Hobbes *The Leviathan* Part I Ch.13, 64.

²²³ *Ibid*: Part I Ch. 13, 66.

²²⁴ *Ibid*: Part I Ch.13, 65-66.

²²⁵ *Supra*: Mc.Cormick 'Fear, Technology and the State', 619, 622: 'Human beings, once confronted with the prospect of their own dangerous will be terrified into the arms of state authority'.

²²⁶ From the perspective of the 20th Schmitt, Hobbes' construction of the state, prefigured by his perception of the natural disposition of human beings, is valid in its acknowledgment of the dangerous and dynamic characteristics of human beings, when not appropriately controlled: *Supra*: Schmitt *The*

formulation that heightens Man's irrationality to an extent where warfare is inevitable, yet simultaneously demands sufficient rationality to avoid this ostensibly ineluctable outcome. To this extent, '*the power of the irrational in human affairs*' properly encapsulates '*a critique*' in demanding that, '*irrational drives that lead to war [must] be overcome by rational natural laws that lead to peace*'.²²⁷

Inescapably, however, the chief motivation of every human being, whether within or outside the state of nature is self-preservation; the basal yearning not to be put to the sword; to avoid violent death; in short to survive. In this anarchic, conflict-riven natural condition, rationality combines with innate passion to initiate the ascent from disorder into civil society:

'Thus much for the ill condition, which man by mere nature is actually placed in, though with a possibility of coming out of it, partly in his passions, partly in his reason. The passions that incline men to peace are fear of death, desire of all things necessary to commodious living, and the hope by their industry to obtain them.'²²⁸

However, the concept of 'reason' is itself susceptible to dual interpretation. On a substantive, ontological and metaphysical formulation, the vaunted 'preservation of mankind' for which 'reason' impels Man to strive is defined in terms of an ethical imperative; in essence, what promotes the 'moral good' of the human race is intrinsically desirable. This is the quintessential goal. In contrast, on the reading of Bobbio, 'reason' is '*no less a part of human nature than any other faculty or affection*'.²²⁹ Man possesses the facility to undertake rational computations about the optimal route to realise a preferred objective. 'Reason', here understood in a formal, methodological and instrumental sense, culminates in an expedient response to the exigencies of concrete disorder.²³⁰ This, in turn, produces a '*manifestly human and teleological, indeed utilitarian conception of the state; that the state is made by humans*

Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol, 36. See also *supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 253: 'Schmitt [thus] shares with Hobbes not only a similar historical context but a similar outlook on humanity as well.' However, as is discussed *infra*: section 6, Schmitt seeks to intensify and instrumentalise the fear generated by the natural condition of Man within the state of nature rather than negate it, as with Hobbes.

²²⁷ John Samples 'Review of The Crisis of Parliamentary Democracy' *TELOS* No. 72, (Summer 1987), 205, 210.

²²⁸ *Supra*: Hobbes *The Leviathan*, Part I Ch.13, 66.

²²⁹ Thomas Hobbes *De Cive* Part II, Ch. 1, 16.

²³⁰ Ambiguities such as this, within Hobbesian theory, are ripe for subsequent exploitation by Schmitt as discussed: section 6.

for the purpose of benefiting themselves'.²³¹ Preservation of concrete integrity and security is paramount since without the guarantee of physical safety, moral welfare is an extraneous luxury. Whichever interpretation Hobbes ultimately intends, however, it is clear that his preoccupation lies in the belief that only through the mechanism of Reason might Man's torment within the state of nature be adequately alleviated.²³²

'Hobbes champions an antiheroic ethos which he sees is alone in accord with the laws of nature. Man's desire is to safeguard his personal safety.'²³³

From the rationality inhering within Man, flow Articles of Peace, the Laws of Nature.²³⁴ Primarily, every man is enjoined to pursue peace and to this end to abide by the injunction, '*whatsoever you require that others should do to you, do you unto them*'.²³⁵ Hobbes proceeds to set forth a number of further precepts emanating from his notions of equity: fairness, clemency, humility, impartiality, generosity, modesty and what he otherwise designates as Moral Virtues.²³⁶ Common to all is the conception of 'good' in contradistinction to its antonym, perceived by Hobbes as the embodiment of 'evil'.²³⁷ But of these, it is his third Rule that is ultimately pivotal to his construction of the state and the relationship between sovereign and subject. In essence, men must obey their covenants. Herein lies the fountain of justice, in that 'injustice' is defined simply as the 'not-performance of covenants' with its potentially devastating corollary: '*whatsoever is not unjust is just*'.²³⁸ Disobedience is accordingly synonymous with injustice and it is this equation that strips Man of the facility to choose whether to obey.²³⁹ Specifically,

²³¹ *Supra*: Weiler *From Absolutism to Totalitarianism*, 43.

²³² *Supra*: Lee *The Legal-Rational State*, 80: 'Hobbes reduces morality to expediency or prudence'. *Ibid.* 81: 'The overriding goal of law is to prevent the strife and chaos caused by every individual being determined to preserve his own life. In formulating law, the sovereign is governed by this goal, which means that, in theory, there can be no conflict between good as seen by the sovereign and good as seen by the subjects'.

²³³ *Supra*: Weiler *From Absolutism to Totalitarianism*, 150.

²³⁴ *Supra*: Hobbes *The Leviathan*, Part I Ch.13, 66.

²³⁵ These are the First and Second Laws of Nature described by Hobbes in *The Leviathan* (New York: Prometheus Books, 1988), Part I Ch.14, 66.

²³⁶ *Supra*: Lee *The Legal-Rational State*, 49: 'To Hobbes, morality does not really exist. When men talk about good and evil, they are not talking about anything that exists above the passions'. *Ibid.*: 50: 'Hobbes denies the existence of the 'ought' of morality as neither meaningful nor necessary'.

²³⁷ *Supra*: Hobbes *The Leviathan*, Part I Ch.15, 82.

²³⁸ *Ibid.*: Part I Ch.15, 74.

²³⁹ *Supra*: Hobbes *The Leviathan*, Part II Ch.30, 185: 'To the care of the Sovereign belongeth the maker of Good Laws. But what is a good law? By a good law, I mean not a just law, for no law can be unjust. The Law is made by the Sovereign Power and all that is done by such Power is warranted in the name of the people; and that which every man will have so, no man can call it unjust. It is the Laws of the

non-compliance, whether by omission or commission, is tantamount to an ‘unjust’ infraction of obligation. The legality of conformity assumes priority over substantive content. To summarise:

- In the pre-state condition, Man dwells in the chaos of the awful state of nature, governed by nothing but abiding fear
- Life is intolerable without negation of this natural fearful existence
- Conflation of passion and reason impel the deliverance of Man from his natural condition
- Reason dictates the paramount objective of Man to be the establishment of permanent peace and security
- This goal is attainable only by adherence to the Laws of Nature (Articles of Peace)
- The Law of Nature that subsumes the remainder, is that which forbids a man to act in a manner destructive to his own life; takes away the means of preserving it and prohibits the omission of any device by which life can be best maintained²⁴⁰
- Another crucial Law of Nature requires Man to keep his covenants
- ‘Not performance’ with contractual obligations, in itself, constitutes injustice’ irrespective of the content of the covenant that Man is required to obey
- Because the Laws of nature are eternal, violation of covenant, even within the state of nature, is a sin²⁴¹

But if the Laws of Nature and the sinful status consequential to violation of covenant inhabit the state of nature, why is Man condemned in his natural pre-political condition to anarchic lawlessness? Surely ‘law’ connotes obligation, and obedience pursuant to such duty ought therefore to guarantee order. Indeed, evidence abounds throughout *Leviathan* that the Hobbesian Laws of Nature emanate from a transcendent, divine and presumably mandatory source.²⁴² Hobbes embraces the notion of God as ‘*the first and eternal cause of all things*’.²⁴³ These Laws are also variously described as ‘*immutable*

Commonwealth as in the laws of gaming; whatsoever the gamesters all agree upon is Injustice to none of them. A good law is that which is needful for the Good of the People and withal Perspicuous’.

²⁴⁰ *Supra*: Hobbes *The Leviathan*, Part I Ch.13, 66.

²⁴¹ *Supra*: Hobbes *The Leviathan*, Part II Ch.27, 155.

²⁴² See Howard Warrender *The Political Philosophy of Hobbes: his Theory of Obligation* (Oxford: Clarendon Press, 1957) in which Warrender does not uphold the view that Hobbes was the precursor of legal positivism. Rather, the foundation of obligation is to Warrender not the command of the sovereign but rather the laws of nature which arise in the state of nature (that is, the state of nature is not a condition without obligation). These laws ultimately arise from and are enforceable as divine commands, sanctioned through the threat of eternal damnation or the promise of eternal salvation. According to Gottfried, Warrender identifies ‘natural laws as the “summer of Moral Philosophy” and sees them anchored in the “divine law” manifesting itself in human reason’: Howard Warrender, ‘Hobbes’ Conception of Morality’, *Rivista Critica di Storia della Filosofia*, 17 (1962), 436-37, cited in Paul Gottfried *Carl Schmitt Politics and Theory* (New York and London: Greenwood Press, 1990), 45. This view, whereby Hobbes purportedly measured political actions by a transcendent standard of the ‘Good’, has not been universally accepted.

²⁴³ *Supra*: Hobbes *The Leviathan*, Part I Ch.12, 55.

and eternal’,²⁴⁴ emanating from all eternity and, as such, not only natural but moral²⁴⁵ and possessing divine provenance.²⁴⁶ In similar vein, Hobbes defines obedience to God’s laws, that is, to the Laws of Nature, as the greatest worship of all.²⁴⁷ Thus far, the conception of transcendent law appears all-pervasive within Hobbes’ moral and political philosophy. Indeed, Hobbes is prepared to accede to a traditional tenet of natural law whereby the Laws of Nature are deemed to bind *in fore interno*. Breach is perpetrated not only by facts contrary to Law but even those in accordance with it, provided that the intent contravenes the spirit of Law.²⁴⁸ But still, the vital step is missing, for whether the Laws of Nature within the Hobbesian repertoire are understood as either eternally valid or divinely inspired, they appear not always *externally* binding.²⁴⁹ Alternatively, Hobbes from time to time advocates an interpretation of the Laws of Nature, founded entirely upon reason. Described variously ‘*as the precepts of natural reason written in every man’s heart*,’²⁵⁰ and worthy of the designation, ‘law’, simply when ‘*each man takes from his own reason that which is similarly agreed as reason by all men*’,²⁵¹ does *this* version of the Laws of Nature cause Man to be bound *in fore externo* even within the state of nature? It would seem not:

‘These dictates of reason men used to call by the name of Laws but improperly; for they are but conclusions of theorems concerning what conduces to the conservation of and defence of themselves; whereas Law properly is the word of him that by right has command over others. But yet if we consider the same theorems delivered in the word of God that by right commands all things, then are they properly called Laws.’²⁵²

Though not consistently maintained throughout *Leviathan*, it is manifest, at least on the analysis posited above, that effectual law cannot exist unless promulgated by the sovereign. Furthermore, Hobbes stresses elsewhere that sovereign authority reposes within the Commonwealth, not the state of nature. Indeed, the relinquishment of the

²⁴⁴ *Supra*: Hobbes *The Leviathan*, Part I Ch.15, 82. On this point, see Howard Warrender *The Political Philosophy of Hobbes: his Theory of Obligation* (Oxford: Clarendon Press, 1957), 73-74, in which Warrender argues that Hobbes thereby conferred on the ‘immutable and eternal’ Laws of Nature, a higher validity than laws enacted by statute. Accordingly, what they forbid can never be lawful and whatever they command can never be unlawful.

²⁴⁵ *Supra*: Hobbes *The Leviathan*, Part II Ch.26, 151.

²⁴⁶ *Ibid*: Part II Ch.31, 192.

²⁴⁷ *Ibid*: Part II Ch.31, 195.

²⁴⁸ *Supra*: Hobbes *The Leviathan*, Part I Ch.15, 82.

²⁴⁹ *Ibid*: Part I Ch.15, 82.

²⁵⁰ Thomas Hobbes *Leviathan*, reprinted from the edition of 1651 (Oxford: Clarendon Press, 1909), Part III Ch.42, 402.

²⁵¹ *Supra*: Hobbes *The Leviathan*, Part II Ch.26, 144.

²⁵² *Supra*: Hobbes *The Leviathan* Part I Ch.15, 83.

natural condition of man rests upon the notionally consensual appointment of a sovereign. Enforceable laws, reinforced by threat of punishment and the fear this engenders, are inextricably intermeshed with the formation of the state. It is only then that the Laws of Nature, previously enjoying the status of mere theorems, become transformed into ‘laws’ *stricto sensu*. On this reading, ‘law’ that is binding *in fore externo* is accordingly contingent on the formation of the state.²⁵³

Despite the confusion immanent within Hobbes’ political theory concerning the exact provenance of the Laws of Nature, one point *is* clear: Hobbes deems the Laws of Nature insufficiently prescriptive to impose order within the pre-political natural condition.²⁵⁴ Coercive authority is vital to control Man’s unbridled ambition, avarice and anger and this is not possible in the state of nature, where each man is equal and judge of the justice of his own fears.²⁵⁵ Hobbes must now interweave his complex miscellany of ingredients: the volatile and hostile state of nature; Man’s dynamic dangerousness; the destructive desire for power and the problematic Laws of Nature, underpinned by either an ethical or prudential imperative for Peace.²⁵⁶ The ensuing section seeks to elucidate this pivotal process.

²⁵³ The interpretation of the Laws of Nature is discussed in some detail by David Gauthier in ‘Hobbes: The Laws of Nature’ *Pacific Philosophical Quarterly* Vol. 82, (2001), 258-284. He focuses on the debate as to whether these Laws are to be understood primarily as theorems of reason or commands of the civil sovereign or commands of God. He ultimately concludes that a textual analysis of Hobbes’ work is most supportive of the thesis that they are primarily rational precepts and only secondarily divine or civil commands.

²⁵⁴ *Supra*: Lee *The Legal-Rational State*, 83: ‘In the state of nature, even the ‘laws of nature are only binding in conscience as are any mutual covenants made. All terms like just and unjust are robbed of their normative overtones. Hobbes demotes traditional morality because it poises a threat to legal absolutism’

²⁵⁵ *Supra*: Hobbes *The Leviathan*, Part I Ch.14, 70.

²⁵⁶ *Supra*: Lee *The Legal-Rational State*, 52.

Man's covenant with Man and the creation of the Commonwealth

As above, ethical precepts of undetermined origin manifestly exist within the state of nature. However, without 'a common power to keep them in awe and direct their actions to the common benefit',²⁵⁷ such promises are mere words without swords and incapable of enforcement. Impelled by the rationality of Man, abjuration of the state of nature is attained by dint of a covenant of every man with every man to which crucially, the sovereign is not party:²⁵⁸

'Sovereign authority ultimately rested in a rational delegation of right from his subjects. *Leviathan* rests on the dictates of reason.'²⁵⁹

Crucially, breach by the sovereign is not feasible since no complaint can be levelled against one from whom no promise has been extracted. Sovereign authority is therefore potentially absolute, not contingent upon adherence to specified obligations.²⁶⁰ Nor may a former dissenter repudiate the sovereign. Once the Commonwealth is established, the objections of the minority are subsumed within the will of the major part and extinguished.²⁶¹ If any man persists in rebellion, he is condemned to remain in the state of nature and be destroyed. The covenant of every man with every man (excluding the sovereign) is consummated in the formation of the Commonwealth where, pursuant to the Laws of Nature, the sovereign attains pre-eminent status and becomes '*the Head, the Source, the Root and the Sun, from which all jurisdictions are derived*':²⁶²

'This covenant is conceived in an entirely individualistic manner. All ties and groups have been dissolved. Fear brings atomised individuals together. A spark of reason flashes and consensus emerges about the necessity to submit to the strongest power. The accumulated anguish of individuals who fear for their lives brings a new power into the picture: the *Leviathan*.'²⁶³

Described by Hobbes as more than mere consent or concord, this process entails renunciation or transfer of Man's natural rights to a sole, undivided sovereign person or assembly, through either reason or scripture, '*as great as man can be imagined to make*

²⁵⁷ *Supra*: Hobbes *The Leviathan* Part II Ch.17, 87, 88.

²⁵⁸ The significance of this is explored *infra*: this section.

²⁵⁹ John Samples 'Review of The Crisis of Parliamentary Democracy' *TELOS* No. 72, (Summer 1987), 205-214.

²⁶⁰ *Supra*: Hobbes *The Leviathan*, Part II Ch. 17, 91.

²⁶¹ *Ibid*: Part II Ch. 17, 91.

²⁶² Thomas Hobbes *Leviathan* reprinted from the edition of 1651 (Oxford: Clarendon Press, 1909), Part III, Ch. 42, 446.

²⁶³ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 33.

it'.²⁶⁴ It is in this drastic compact to surrender those privileges that were his, by right, in the natural state that a moral component is arguably intrinsic:

'The social contract is the expression of the idea that ruler-ship has a moral content, if only to the minimal extent that the obligation to obey must be rooted in its having been freely assumed by those subject to it.'²⁶⁵

Each individual submits his will, by plurality of voice, to one will.²⁶⁶ The multitude, so united, comprises a commonwealth;²⁶⁷ the wondrous transformation of war into peace, chaos into order, underpinned by the duty to obey the appointed sovereign authority:

'I authorise and give up my right of governing myself to this man or assembly on condition that you give up your right to him and authorise all his actions in like manner.'²⁶⁸

Given that Hobbes postulates the state of nature as the normal existence of humankind, the formation of the Commonwealth constitutes an exceptional departure from the havoc endemic within Man's pre-state or interregal plight. This is, in essence, a sovereign dictatorship, wherein the warlike propensities of man are suppressed and controlled within a condition of permanent emergency. As Schmitt later endorsed:

'The absolutism of the state is accordingly the oppressor of the irrepressible chaos inherent in Man.'²⁶⁹

Exigent circumstances require an extreme response. For Hobbes, this dwells in the sovereign, the repository of the authority needed to control and subdue the otherwise unbridled passions of those he subjugates to his will - his subjects. To the state of nature, Hobbes opposes order, attainable only through the sustained imposition of sovereign rule. Eradication of indivisible sovereignty spells a descent into chaos; in contrast, instigation and preservation of 'authoritarian dictatorship' are imperative prerequisites to harmonious co-existence. No intermediate condition exists between Man's natural situation and the sovereign State; in essence the 'exception' becomes the norm:²⁷⁰

²⁶⁴ *Supra*: Hobbes *The Leviathan*, Part II Ch.20, 109.

²⁶⁵ *Supra*: Weiler *From Absolutism to Totalitarianism*, 104.

²⁶⁶ *Supra*: Hobbes *The Leviathan*, Part II Ch.17, 89.

²⁶⁷ *Ibid*: Part II Ch.17, 89.

²⁶⁸ *Ibid*: Part II Ch.17, 89.

²⁶⁹ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 21.

²⁷⁰ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 34: 'The sovereign who decides when the legal exception exists and the dictator who is commissioned to bring it to an end, were

‘Hobbes’ sovereign and state are a kind of dictatorship that has its sole task guarding over the ever-present exception and, as such is no longer commissarial but appropriate to its own name, sovereign.’²⁷¹

roles fused by Hobbes.’ The significance of this elimination of any condition between the chaos of the state of nature and the order supposedly attendant upon the establishment of the sovereign state is highlighted again, in the discussion relating to Schmitt’s utilisation of the distinction between commissarial and sovereign dictatorship/ the state of exception *infra*: section 6.

²⁷¹ *Supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology*, 132. The wider significance of the primacy Hobbes affords to the ‘sovereign dictator’ vis-à-vis Schmitt’s conceptualisation of ‘dictatorship’ is explored further *infra*: section 6. *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 36: In essence, Schmitt coined the term, ‘sovereign dictator’, to designate a provisional legal authority, exercised in the name of the sovereign people which dissolves the old constitution and enacts a new one.’

Reciprocity within the Commonwealth: obedience and protection

In this new reality of the post-inaugural State, dominated by the pre-eminence of the sovereign will, does Man necessarily forfeit all those rights that inured to him in the state of Nature? Hobbes deems only one such natural right inalienable, that of self-preservation, since it is the fear of death that initially propels Man from the state of nature. Were an individual to sacrifice the right to save his own life, the voluntaristic rationale for the institution of the Commonwealth would be negated.²⁷² On this point, Hobbes even permits ‘natural timorousness’ in battle. Cowardly or dishonourable though such conduct may be, this is not tantamount to injustice:²⁷³

‘All men are by nature free. If a sovereign commands a man to kill, wound or maim him self or not to resist those who assault him or to abstain without food, air and all things without which he cannot live, yet has that man liberty to disobey. By allowing the sovereign to kill me, I am not bound to kill myself when he commands it.’²⁷⁴

In virtually every other respect, however, the duty to obey is unequivocal; an obligation firmly entrenched within the Laws of Nature. Exemplifying Hobbes’ rigorous counterrevolutionary conservatism, subjects are neither permitted to revoke the mode of governance nor to repudiate the sovereign without the ruler’s consent.²⁷⁵ Indeed, it is a ‘dictate of natural reason and consequently an evident law of nature that no man ought to weaken that power, the protection whereof he himself demanded or unwittingly received’.²⁷⁶ Natural law is clearly deployed to uphold sovereign authority. Similarly, an act of rebellion violates the Laws of Nature,²⁷⁷ whilst subversion is deemed contrary both to these ‘laws’ and divine positive law. Notably, Hobbes has recourse again, in part, to natural law to safeguard his sovereign against potential mutiny or treason:²⁷⁸

‘Whether a monarchy, democracy or aristocracy, it is against both the Laws of Nature and the divine positive law, to do anything tending to the subversion of the civil sovereign.’²⁷⁹

²⁷² *Supra*: Mc.Cormick ‘Fear, Technology and the State’, 619, 641: ‘It is only the retention of some subjectivity regarding the self –preservation that rules in the state of nature that encourages Hobbesian man to make a compact and submit to the state’.

²⁷³ Thomas Hobbes *The Leviathan*, Part II Ch.21, 115. A similar point also appears in *De Homine* Ch. XIII, 9 where Hobbes specifically denies the status of courage as a virtue. Man is under no obligation to sacrifice his own life in battle, even for the good of the Commonwealth.

²⁷⁴ *Ibid*: Part II Ch.21, 114.

²⁷⁵ *Ibid*: Part II Ch.18, 90.

²⁷⁶ *Ibid*: Part II Ch.26, 145.

²⁷⁷ *Ibid*: Part II Ch.30, 179.

²⁷⁸ *Supra*: Hobbes *The Leviathan*, Part III Ch.42, 454.

²⁷⁹ *Ibid*: Part III Ch.42, 429.

However, to constitute ‘injustice’, rebellion of this type must be manifestly known, rather than confined to secret inchoate thoughts buried within the heart of Man. Hobbes draws a potentially key distinction between internal faith that is in its own nature invisible and consequently exempted from all human jurisdiction, and the actions that proceed from it, deemed breaches of civil disobedience before God and Man.²⁸⁰

‘A private man has always the liberty (because thought is free) to believe or not to believe in his heart ...but when it comes to confession of that faith, the private reason must submit to the public, that is God’s Lieutenant’.²⁸¹

Essentially, therefore, each individual is permitted unassailable mastery of his own conscience, provided that private thoughts are never transmuted into actions subversive of sovereign authority. Because such intrusions are contrary to the Laws of Nature, Hobbes insists that ‘*men’s beliefs and interior cogitations are not subject to the commands of the sovereign but only to the operation of God*’.²⁸² Almost three centuries later, Carl Schmitt was to seize upon this dichotomy between inner faith and outer confession to explicate Hobbes’ alleged vulnerability to exploitative and destructive agents that culminated in the ‘value-neutral’ legal positivism, so reviled by him.²⁸³ Otherwise, Hobbes permits only two substantive exceptions to the mandate of obedience, firstly where lack of conformity does not subvert the original purpose for which sovereign power was instituted²⁸⁴ and next, where compliance is repugnant to the laws of God.²⁸⁵ The latter departure, in particular, possesses the capacity to undermine Man’s duty of conformity, but as seen below, is never allowed to significantly impinge upon the requisite act of total subjugation to sovereign authority.

Even in the absence of the foregoing exceptions, the duty to obey is delimited by the sovereign’s capacity to accord the subject protection. Obedience and protection are co-extensive.²⁸⁶ More specifically, the generally applicable duty of obedience survives only

²⁸⁰ *Ibid*: Part III Ch.42, 407.

²⁸¹ *Ibid*: Part III Ch.37, 344.

²⁸² *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 152.

²⁸³ This is a recurrent theme. See *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*.

²⁸⁴ *Supra*: Hobbes *The Leviathan*, Part II Ch. 21, 114

²⁸⁵ *Ibid*: Part II Ch.31, 189. This is explored further in this section.

²⁸⁶ Schmitt reduces the protection element of this correlate, almost to vanishing point. This emerges *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*.

for the duration of the protection the sovereign affords the subject. Integral to the office of sovereign and indeed, the end for which sovereign power is inaugurated, is 'procuration of the safety of the people'.²⁸⁷ In order to fulfil this vital protective function, Hobbes vests in the sovereign the sole right of judicature; the right to negotiate peace and to wage war; the right to reward and to punish.²⁸⁸ Implicit in Hobbes' theory is the presumption that the sovereign, with the foregoing dominion over his subjects, will never, by choice, abnegate the obligation to protect them. Only, therefore, when the sovereign is precluded by external factors from fulfilling this duty to protect, is the subject relieved of the duty to obey.²⁸⁹ At that point, all natural and temporarily suspended rights are restored to each individual to whom succour is no longer extant. Dormant rather than defunct under effective sovereign authority, the 'war of all against all' now emerges afresh, with the attendant chaos this inevitably engenders:

'When the sovereign power ceases, crime also ceases for where there is no such power, there is no protection and everyone may protect himself by his own power.'²⁹⁰

Once protection evaporates, the rationale of self-preservation upon which the Commonwealth is founded, likewise dissipates. It is only fitting therefore that Man is released from his covenant of obedience. However, because this exemption from the duty to obey is empirically rare, the subject must be fully cognisant of the array of 'law' that frames his obligation to the sovereign. Hobbes demonstrably deploys the Laws of Nature, in conjunction with his account of the natural condition of men, to justify establishment of the Commonwealth. This, in turn, putatively guarantees a more tranquil existence than was feasible within the state of nature.²⁹¹ But do these professed inclinations towards natural law theory possess, for Hobbes, a lustre more ersatz than real? Is the natural law pedestal upon which he grounds his civil state destined to fade

²⁸⁷ *Supra*: Hobbes *The Leviathan*, Part II Ch. 30, 178 In *De Cive* Ch. XIII, 6 and 14, Hobbes describes the health/safety/welfare of the people, the '*salus populi*' as lying (1) in defence against the enemy without; (2) in preservation of peace within; (3) in just and modest enrichment of the individual, which is much more readily attained through work and frugality than through victorious wars and is particularly promoted through the work of mechanics and mathematics; and (4) in the enjoyment of innocuous freedom.

²⁸⁸ *Ibid*: Part II Ch.17, 93-94.

²⁸⁹ *Ibid*: Part II Ch.21, 116.

²⁹⁰ *Ibid*: Part II Ch. 27, 155.

²⁹¹ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 258: 'Subjects give up their epistemological uncertainty in respect of the totality of human nature – their fear of everything and everyone at every moment – for the more tolerable knowledge that it is only the state that is to be feared and then only under certain conditions. Indeed, Hobbes names his state after the mythic biblical monster, the *Leviathan*'.

into oblivion once the Commonwealth comes into being? Only through the ensuing scrutiny of the prevailing law within and beyond the confines of the state might these enigmas be gradually unveiled and the legal accountability of the subject and indeed the sovereign accurately assessed.

The sovereign makes the 'law'?

Viewed from any perspective, Hobbes manifestly establishes his Commonwealth for the preservation of the peace and security of Man. Whether this is achievable, however, rests on the potency and extent of sovereign authority and, in turn, the 'law' that furthers or fetters it. 'Law', for Hobbes, is divisible into two principal categories: the one natural, from all eternity and therefore also universal and possibly divine,²⁹² and the other, positive, comprising both:

- (i) Laws made by the will of the sovereign, either written or otherwise made known to men; and
- (ii) Divine laws, of a positive (rather than natural) variety, being the commandments of God (not from eternity or universally addressed to all men), declared for such, by those whom God has authorised to declare them.²⁹³

These variants of positive law created, declared, promulgated or otherwise interpreted by or through the offices of the sovereign authority, are '*the artificial chains called civil laws*'²⁹⁴ imposed for the attainment of Man's peace and conservation. Hobbes dictates that Force and Justice, vested respectively in the institutions of sovereign and parliament, constitute the two arms of the Commonwealth.²⁹⁵ Law lies in command, and in every court, the sovereign is he who judges.²⁹⁶ Quintessentially, therefore, authority not truth makes law.²⁹⁷ Within the Commonwealth, the sovereign is the sole legislator and none but him is empowered to make or abrogate law.²⁹⁸ Further, Hobbes expressly declines to subjugate his sovereign to the Civil Law:

'The sovereign is not subject to Civil Law. He that can bind can release and therefore, he that is bound to himself only, is not bound.'²⁹⁹

Nothing is unjust that is not contrary to some law and it is through the enactment and implementation of civil law that the distinction is drawn between right and wrong.³⁰⁰ Adumbrating legal positivism of the Kelsenian variety, it becomes impossible to speak

²⁹² *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 151.

²⁹³ *Ibid*: Part II Ch. 26, 151.

²⁹⁴ *Ibid*: Part II Ch. 21, 111.

²⁹⁵ *Ibid*: Part II Ch. 26, 142.

²⁹⁶ *Ibid*: Part II Ch. 26, 143.

²⁹⁷ The Latin form, '*auctoritas, non veritas facit legem*' is often used.

²⁹⁸ *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 141.

²⁹⁹ *Ibid*: Part II Ch. 26, 141.

³⁰⁰ *Ibid*: Part II Ch. 26, 140.

of just and unjust law because *'it is the law itself, which creates the distinction between right and wrong; just and unjust'*.³⁰¹ Determination, not only of what is permissible but more startlingly the substantive content of what comprises truth, propriety and rectitude, seemingly rests with the sovereign:

'The makers of the civil laws are not only the declarers but also the makers of the justice and injustice of actions, there being nothing in men's manners that makes them righteous or unrighteous but their conformity with the Laws of their sovereigns.'³⁰²

In addition to the type of civil law promulgated as an act of pure sovereign will, is Hobbes' category of divine positive law. Because divine law is only unreliably made known to Man, by revelation, or through the interpretation of scripture by a Church that seeks to encroach insidiously upon the absolute power of the state, Hobbes closes this gap with devastating simplicity:

'In a Commonwealth, a subject that has no certain and assured revelation concerning the will of God, is to obey for such the command of the Commonwealth; for if men were at liberty to take for God's commandments their own dreams and fancies or the dreams and fancies of private men, scarce two men would agree upon what is God's commandment and yet in respect of them every man would despise the commandments of the Commonwealth.'³⁰³

What constitutes divine positive law, therefore, lies entirely within the aegis of the sovereign.³⁰⁴ It is the sovereign who interprets and propagates divine law and this process is purportedly definitive as to the existence, efficacy and content of that law. Just as men's private beliefs are not punishable under the civil law,³⁰⁵ Man is conversely not entitled to pursue his own subjective notions of God's will, if at variance with the command of his human sovereign. The privilege Hobbes affords on the one hand is, therefore, artfully converted into compliance on the other.

Taken in isolation, Hobbes thus appears to concoct an absolutist state where the sovereign is deferential neither to superior authority nor to the positive law of which the sovereign is author or 'interpreter'. If Hobbesian political philosophy extended no further, then this would indeed be 'legal positivism' with a vengeance; the more so,

³⁰¹ *Supra*: Lee *The Legal-Rational State*, 83.

³⁰² *Supra*: Hobbes *Leviathan*, reprinted from the edition of 1651 (Oxford: Clarendon Press, 1909), Part III, Ch. 42, 427.

³⁰³ *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 153.

³⁰⁴ *Supra*: Lee *The Legal-Rational State*, 84: 'Divine law is rendered innocuous by his dismissal of supernatural revelation and miracles and then by his assimilation of divine law with his 'laws of nature'' as argued by him'.

³⁰⁵ This is discussed further in this section.

since Hobbes seems sporadically indifferent to the precise process by which civil law is created.³⁰⁶ His only concern is seemingly the institution of a Commonwealth, under the auspices of which the sovereign maintains order by promulgation of the civil laws that hold his subjects in thrall:

‘The myth of the state must invoke uniformly and in a controlled manner the terror that each citizen felt individually and overwhelmingly in the state of nature.’³⁰⁷

But, having laboriously crafted and seemingly endorsed a seminal version of modern legal positivism, Hobbes appears unable or, perhaps, reluctant to completely detach his theory of the state from the natural law tradition into which he was born. On this point, the Laws of Nature are manifestly indispensable to the *inauguration* of the Commonwealth. Further, despite Hobbes’ apparent zeal in purporting thereafter to accord primacy to legal provisions, positively-promulgated by the sovereign, is a residuary role for the Law of Nature within the sovereign state nonetheless preserved?

Ostensibly so, since even as he constructs his authoritarian model of sovereignty Hobbes proceeds to posit, somewhat problematically, that the Law of Nature and the Civil Law contain each other and are of equal extent.³⁰⁸ In similar vein, ‘*civil and natural laws are not different kinds but different parts of the same law*’.³⁰⁹ Upon what basis does Hobbes rationalise this integrated conception of law; how does his sovereign interact with natural law and crucially, is the sovereign accountable to the Laws of Nature? More prosaically, are civil laws valid only where they conform to natural law? Firstly, Hobbes recalls the ‘justice’ inhering within Man’s performance of covenant and his compliance with the other Laws of Nature. Because every subject within the Commonwealth promises obedience to the civil law, each act of adherence to positively-given law is part also of the Laws of Nature. Civil law accordingly forms part of the Laws of Nature.³¹⁰ But how then is the corollary established by which the Laws of Nature are reciprocally elemental within Civil Law?

For Hobbes, the Laws of Nature, extant within the state of nature at the moment of the pivotal transition into civil society: equity, justice and the other moral virtues are

³⁰⁶ This arguably sows the seeds of Carl Schmitt’s theory of decisionism.

³⁰⁷ *Supra*: Mc.Cormick ‘Fear, Technology and the State’, 619, 636.

³⁰⁸ *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 141.

³⁰⁹ *Ibid*: Part II Ch. 26, 141.

³¹⁰ *Ibid*: Part II Ch. 26, 141.

transformed into ‘laws’, only on institution of the Commonwealth, and no earlier. It is only the intervention of the sovereign that imbues natural law with the requisite element of coercive force. Essentially, it is the sovereign command that obliges men to obey. To declare what comprises a Moral Virtue requires a sovereign ordinance, reinforced by punishment. Hence, the Law of Nature becomes part of the Civil Law.³¹¹ Though possibly divine, irrefutably eternal and universally known without active promulgation, the Laws of Nature are still enforceable and effectual only through the offices of the sovereign. Human interpretation and implementation through the sovereign authority are indispensable to the efficacy of natural law. Whether this exercise is performed by the sovereign or his legitimate representatives, judicial or otherwise, is of no consequence. The ‘*interpretation of all laws depends on the authority of the sovereign*’,³¹² and of all laws, Hobbes decrees that the unwritten law of nature is the most obscure and therefore in greatest need of able interpreters:

‘It is by sovereign power that the Laws of Nature are law. Otherwise, it would be a great error to call the laws of nature unwritten law. Interpretation of the law of nature is the sentence of the judge constituted by the sovereign authority to hear and determine controversies. Interpretation is authentic, not because it is the judge’s private will but because it is by authority of the sovereign whereby it becomes the sovereign’s sentence.’³¹³

However, Hobbes is anxious to pre-empt and quash unsolicited and potentially dangerous counsel. In contrast to Schmitt’s self-exculpatory assertions based upon mere scholarly activity,³¹⁴ Hobbes exhorts against the dangers of false teachers who misinterpret the Laws of Nature³¹⁵ and reserves particular contempt for professors of law, whose subversion of sovereign power is ‘*a greater crime than in another man*’.³¹⁶ He even seeks to circumscribe authentic judicial authority in that, insofar as possible, ‘*it is preferable for judges merely to execute the will of the sovereign, than to act as mini-sovereigns*’.³¹⁷ Yet, in a manner that no modern legal positivist can countenance Hobbes

³¹¹ *Ibid*: Part II Ch. 26, 141. This could, perhaps, be relevant to the issue of the validity of retrospective punitive sanctions though Hobbes is dealing here with judicial discretion rather than the legislative or executive imposition of ex post facto law.

³¹² *Ibid*: Part II Ch. 26, 146.

³¹³ *Ibid*: Part II Ch. 26, 147.

³¹⁴ See *infra*: section 6 in the context of his pre-Nuremberg interrogation.

³¹⁵ *Supra*: Hobbes *The Leviathan*, Part II Ch. 27, 157.

³¹⁶ *Ibid*: Part II Ch. 27, 163. Hobbes also adheres to the corollary whereby ‘he that proceeds from the authority of a teacher or an interpreter of the law, publicly authorised, is not so faulty as he whose error proceeds from an peremptory pursuit of his own principles’: *Ibid*: Part II Ch. 22, 161.

³¹⁷ David Dyzenhaus ‘Now the Machine Runs itself’ *Cardozo Law Review* Vol.16, (1994), 1-19.

bestows upon those, to whom micro-sovereignty is *legitimately* delegated, a limited authority to deploy concepts of equity and fairness when positive law is silent:

‘The judge ought therefore if the word of the law does not authorise a reasonable sentence to supply it with the Law of Nature.’³¹⁸

In short, natural law appears sporadically to survive the transition from the state of nature into civil society in that it constitutes the governing precept, specifically by the application of ‘equity’, in the absence of any contravening, positive legal provision.³¹⁹ However, caution is warranted even here. Because Hobbes deems it contemptuous for a judge to deem the sovereign inherently incapable of any act contrary to equity and fairness, the sovereign putatively possesses only those qualities synonymous with ethical propriety and rectitude. Arguably, therefore, in licensing importation of the Laws of Nature when positive law is silent, Hobbes merely seeks to confer upon the relevant decision-making agency the authority to surmise and apply the presumed ‘moral’ will of the sovereign. In essence, to achieve justice, *‘the only reason judges need consider is the sovereign body, which is the reason all men possess that enables them to get out of the state of nature’*.³²⁰ Upholding the legal order as prescribed by the sovereign equates, without more, to the deployment and attainment of equity.³²¹ On this premise, even the silence of the sovereign must be adjudged compliant with natural law since if the sovereign can do no wrong, his passivity is as much in conformity to natural law as his decision to actively enact and promulgate positive law. Within Hobbes’ political

³¹⁸ *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 149.

³¹⁹ Bobbio disputes this contention by labelling the law of nature a *flatus vocis*, a flat breath. ‘The law of nature is not in force in civil society because it is replaced by the law of nature and it is not in force in the state of nature because there are no laws in force other than the laws of utility and force. For the laws of nature, the present does not exist in any place and at any time. There is no specific domain for it’: *supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 141.

³²⁰ *Supra*: Lee *The Legal-Rational State*, 93: if the authority of the judiciary is thus circumscribed in that their only function is to determine the will of the sovereign, then case-law is rendered superfluous. Likewise, customary law is only permitted to the extent that it is tacitly allowed by the sovereign. *Ibid*, 92: ‘the sovereign does not ‘pen it’ but ensures that coercive measures are applied when violated’. *Ibid*. 94: ‘customary and unwritten law are ‘law’ because and only to the extent that they comply with equity. The intention of the legislator (the sovereign) is presumed to be that equity will be done and equity is nothing other than the Laws of Nature’. In this manner, Lee adjudges that Hobbes has successfully closed the circle.

³²¹ *Ibid*: 95: ‘For Hobbes, judges in applying equity are simply applying the ‘laws of nature’, that is, the unwritten law and since equity is the intention of the sovereign body, the judges are not discovering some set of ‘just’ principles from ancient books of authority, or the ‘collective reason’ of the legal profession, or the ‘private’ reason of the individual judge’....This approach by Hobbes would totally undermine the doctrine of precedent established by the common law. All that would be required is to go back to the source, that is, unwritten law, being the intention of the sovereign. All that is needed is to apply the laws of equity afresh, (being reflective of the will of the sovereign), in each and every case decided by the judge’.

philosophy, no necessity exists for curtailment of sovereign authority or for the abuse of power since ‘*Hobbes has a weakness for and a strangely innocent belief in the virtuous ruler*’.³²²

In summary therefore:

- The Laws of Nature subsist within the state of nature but, until institution of the Commonwealth, are chiefly unenforceable and therefore ineffectual
- The Commonwealth is founded upon a covenant between every man and every man, bar the sovereign: the covenant is deemed freely made and without compulsion (save for the impetus of men’s overwhelming fear within the state of nature)³²³
- The Commonwealth is founded unequivocally upon the Laws of Nature: ‘*I ground the civil rights of sovereigns and both liberty and duty of subjects upon the known inclinations of mankind and upon the Articles of the Laws of Nature of which no man that pretends enough but reason enough to govern his private family ought to be ignorant*’³²⁴
- Once established, the Commonwealth is governed by positive civil laws (both human and divine) created, promulgated or interpreted by the sovereign
- The Law of Nature and Civil Law co-exist within civil society
- It is a Law of Nature to obey the civil laws of the sovereign. Thus, the Civil Law is part of the Law of Nature: ‘*It is the essence of the Laws of Nature that prescribes obedience to the civil law that once it has been recognised and respected as a precondition for earthly security, it makes all other laws of nature invalid by founding the validity of civil laws*’³²⁵
- Obedience is founded upon Man’s covenant to obey, ‘*of which the condition of the human nature and the Laws Divine, both Natural and Positive, require an inviolable observation*’.³²⁶ The duty to obey the sovereign authority; not to subvert the sovereign or to commit an act of rebellion, treason or mutiny is effectual without specific incorporation into the Civil Law
- Mutuality exists between protection and obedience
- The remaining Laws of Nature are mere theorems that require incorporation into civil law before becoming effectual. Hence the Laws of Nature are part of the Civil Law
- The Laws of Nature precede their positive law counterpart and where positive law is silent, the ‘eternal’ qualities of equity and fairness fill lacunae within positively-given provisions: ‘*in whatever is not regulated by the Commonwealth, ‘tis Equity (which is the Law of Nature and therefore an eternal law of God) that every man equally enjoy his liberty*’³²⁷

³²² *Supra*: Weiler *From Absolutism to Totalitarianism*, 143.

³²³ See Paul Gottfried *Carl Schmitt Politics and Theory* (New York and London: Greenwood Press, 1990), 43, in which, drawing upon Strauss, Gottfried comments that ‘Hobbes attempts to explain political authority by means of two foundational themes. The first, the power of natural appetite, is the dominant theme. The second, the power of natural reason, is the ancillary one. Reason, the handmaiden of the appetites, protects men from what their animal nature presents as the worst of all evils, violent death’.

³²⁴ *Supra*: Hobbes *Leviathan* reprinted from the edition of 1651(Oxford: Clarendon Press, 1909), conclusion, 554.

³²⁵ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 170

³²⁶ *Supra*: Hobbes *Leviathan*, reprinted from the edition of 1651(Oxford: Clarendon Press, 1909), conclusion, 556.

³²⁷ *Supra*: Hobbes *The Leviathan*, Part II Ch. 26, 123.

- It is insolent and subversive to deem that the sovereign can act otherwise than in accordance with the precepts of the Laws of Nature: '*decisions made by the sovereign 'body' are good because they conform to the 'laws of nature'*'³²⁸
- Legal subjects must therefore take actually existing law as if it were a true interpretation of the laws of nature³²⁹
- Authority, not truth, makes law: '*civil society does not arise so as to save the liberty of the individual but rather to save the individual from liberty which leads him to his ruin*'³³⁰

Hobbes' state is thus manifestly constructed upon natural law foundations whilst the Laws of Nature are also ostensibly pervasive within the Commonwealth itself. Yet, two pivotal questions still remain:

- To what extent must positive law conform to the precepts of the Laws of Nature?
- If such constraints upon sovereign authority do exist, does Hobbes grant the subject any or adequate redress against an 'offending' sovereign?³³¹

³²⁸ *Supra*: Lee *The Legal-Rational State*, 48: 'Hobbes needs an objective and scientific account of good and evil because positivism is both an ideology of order and reform'.

³²⁹ *Supra*: Dyzenhaus 'Now the machine Runs itself', 1-19.

³³⁰ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 70.

³³¹ *Supra*: Seitzer 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis', 203-224: 'The problem is that whilst Hobbes insisted on the primacy of the natural rights of the individual, he did not envision effective institutional mechanisms for ensuring those rights against sovereign authority. There are theoretical reasons for Hobbes' failure to develop effective institutional restraints on the exercise of sovereign authority. The natural equality of the individual, based upon the universal possession of reason which can discern natural law, limits sovereignty, and the indivisible character of sovereignty ensures that the sovereign would not act against itself'.

Individual rights: enforceable or spectral?

It is upon the individual liberty of the subject that both the above inquiries ultimately impinge. Because the Commonwealth is founded, at least in part, upon the rationality of Man; his reasoned desire to substitute peace and security for the havoc of the state of nature, Hobbes vests him with a right of self-preservation that survives the establishment of the state. This potentially undermines the duty of obedience to the sovereign and affords a strictly delimited facility for the assertion of individualistic rights against state authority. But having constructed a theory of public order on an appeal to individual rationality, does Hobbes then seek to preclude it from any significant place in sustaining and recreating public order?³³² For if the individual citizen is ultimately deprived of any effective remedial mechanism, Hobbes may freely bestow privileges upon Man without fear of impeaching his meticulously devised political system. Perhaps then the quintessence of Hobbes' philosophy of the state is ultimately distillable into the extent to which positive law must conform to the precepts of the Laws of Nature. As evinced in the ensuing colloquy, Hobbes does undoubtedly pay lip-service to the subjugation of positively-given provisions to the Laws of Nature. However, does he simultaneously ensnare the subject within an intricately constructed maze where each potential escape route; every avenue of successful complaint against the sovereign is barricaded by obstacles, uncompromisingly forged from implacable iron logic?

Within the Leviathine labyrinth: a discourse between sovereign's representative (R) and subject (S)

S: Within the Commonwealth, to what laws am I, as a subject, liable to adhere?

R: You are required, in all respects, to comply with your civil duty. The law is the command of the sovereign

S: But suppose that I never concurred in the initial appointment of the sovereign. Would I, in those circumstances be able to disregard the dictates of that sovereign?

R: That is not permissible. It is irrelevant whether or not you assented to or dissented from the decision to appoint any particular sovereign as your ruler. You are deemed to consent and if you attempt to repudiate the sovereign, you will be returned to the state of nature and perish.

S: Under what authority am I obligated to obey the sovereign?

R: It is a Law of Nature and a divine law that you must not act in any manner subversive of or injurious to the authority of your sovereign

S: What is the consequence of disobedience?

R: The sovereign has the right to punish you according to the laws of the Commonwealth

³³² *Supra*: Dyzenhaus 'Now the Machine Runs itself', 1-19.

S: And if the law is silent and prescribes no sentence in a particular sphere, what is the effect then? Suppose for example that a subject commits an act of treason on which the law commanded by the sovereign makes no mention³³³

R: In that instance, the court before which the subject appears will be entitled to interpret and apply the Laws of Nature: equity, justice, fairness and the other Moral Virtues in assessing an appropriate outcome for the transgressor³³⁴

S: I am able to comprehend the obligation, within the Commonwealth, to comply with the precepts of the Laws of Nature where those have been incorporated into the civil law. Further, you have explained that where the Civil Law of the sovereign is silent, the authorised representatives of the sovereign are implicitly able to deploy the Laws of Nature. However, by what 'law' is the sovereign bound?

R: The sovereign and his representatives are bound by no law save the unwritten Laws of Nature.³³⁵ The sovereign is himself the subject of God and has therefore to observe the Laws of Nature.³³⁶ He is bound by them to procure the safety of the people, to afford them protection until the ability to protect is torn from him and to render an account to God, the author of that law and none but him.³³⁷

S: Then constraints on the authority of the sovereign exist?

R: That is correct. The state over which the sovereign holds sway is like the biblical Leviathan from the Book of Job, a sea-monster subject to decay like all other earthly creatures. There is in heaven but not on earth things the sovereign should stand in fear of and whose laws he ought to obey. He is subject to diseases and other causes of mortality. Specifically, he has to obey the Laws of Nature.³³⁸

S: It is a solace to me that the sovereign is bound by the Laws of Nature and I will revert to this shortly. But is it similarly a Law of Nature that the subject must obey the sovereign and if so, does this apply in every eventuality? Specifically, I wish to know whether the subject has to obey each and every law promulgated by the sovereign, even where the Civil Law proclaimed by the sovereign is inequitable

R: But you are presupposing that the subject has the right to determine whether the Civil Law conforms to the Laws of Nature. The laws issued by the sovereign are always deemed just and it is contumelious to think otherwise. Obedience to the sovereign is just. Non-compliance is unjust and punishable accordingly

S: If I understand you correctly, you seem to be suggesting that the sole arbiter of the rightness or otherwise of the civil law is the sovereign

R: That is so, although this interpretation must not be repugnant to the Laws of Nature³³⁹

S: But what if the subject believes in his heart that the actions of the sovereign are unjust

R: The subject is the master of his own conscience. He may enjoy such innermost thoughts as he shall deem appropriate provided that he does not translate his internal fancies into external actions. He cannot be punished for what he believes but likewise he cannot disregard the civil law on a whim. It is external conformity with which the sovereign is concerned

S: I am confused. If the subject has valid grounds upon which to think ill of the commands of the sovereign, in particular where they do not adhere to objective standards of equity and fairness, surely the subject has the right to disobey the Civil Law

R: It is insolent to show, by one's conduct, that the subject considers the sovereign to have transgressed the Laws of Nature. The sovereign is always presumed to act in accordance with all

³³³ From a positivist perspective, what appears here to be Hobbes' affirmation of the natural law in the recognition of unwritten and, therefore, non-textually proscribed acts, has potentially retrospective connotations. This is explored further *infra*: Chapter 5.

³³⁴ *Supra*: n. 333.

³³⁵ *Supra*: Hobbes *The Leviathan*, Part II, Ch. 22, 118.

³³⁶ *Ibid*: Part II, Ch. 21, 112.

³³⁷ *Ibid*: Part II, Ch. 30, 178.

³³⁸ *Ibid*: Part II, Ch. 28, 170.

³³⁹ *Ibid*: Part II, Ch. 26, 153.

the Moral Virtues of equity, fairness and the like. As I have mentioned, the interpretation of the law undertaken by the sovereign is always deemed compliant with the Laws of Nature

S: That is irrational. There must be circumstances in which the subject is able to produce evidence that the sovereign has flouted the Laws of Nature, to which you say he must conform. Suppose for example that the sovereign orders my death and I am able to demonstrate my innocence by incontrovertible proof. Is this not a violation of the Laws of Nature?

R: I agree that the sovereign is bound by the Law of Nature and that killing or commanding the death of an innocent subject would be such a breach.³⁴⁰ Nonetheless, killing you, even if entirely innocent, is not an injury to you but to God.³⁴¹

S: But surely I do have a right to preserve my own life, since this was the sole rationale for my giving up the natural rights that inured to me in the state of nature and exchanging my natural condition for the order of civil society.

R: That is so. Civil law is an obligation and takes from each of us the liberty which the Law of Nature gave us, whilst rights are the liberty that the Civil law leaves us.³⁴² That subsisting right is self-preservation.

S: That being the case, can I resist when the sovereign attempts to kill me; especially if I am innocent of breach of any of the Civil Laws of the sovereign?

R: You can lawfully resist for the purpose of preserving your own life but, as I have previously stated, you must bear in mind that the sovereign is liable only to God and not to you for any harm that consequently befalls you.

S: Other than the right to preserve my own life, am I ever permitted to disobey the Civil Law?

R: Only where your actions do not subvert the purpose for which the sovereign was endowed. You are likewise authorised not to comply where to do so would be repugnant to the laws of God.

S: But as you said earlier, I am not allowed to determine what is repugnant to God's laws.

R: That is so. Firstly, the sole interpreter of the Laws of Nature and the divine law of God is the sovereign.³⁴³ Otherwise, it would be impossible for a subject to know whether what is commanded by the civil authority is contrary to the Laws of God or whether too much civil obedience transgresses the laws of the Commonwealth.³⁴⁴ But even if you were entitled to make this determination, this would not avail you. No action on the part of the sovereign, other than his inability to protect you, authorises disobedience.

S: You will need to provide me with a convincing rationale for your last assertion.

R: When you authorised or were deemed to authorise the institution of the Commonwealth and the appointment of the sovereign, you abrogated the right to make war upon the sovereign or to accuse him of injustice or in any way to speak ill of him. This is because you authorised all his actions and in bestowing sovereign power made his actions your own.³⁴⁵

S: By way of clarification, am I right in assuming that because the right of all sovereigns is derived originally from the consent of all who are to be governed,³⁴⁶ any complaint against the action of the sovereign is tantamount to being aggrieved about our own conduct? Therefore, since it is not possible to seek redress against ourselves, it is likewise not feasible to mount any grievance against the sovereign.

R: That is correct. Because every subject is, by the institution of the Commonwealth, the author of all the actions of the sovereign, it follows that whatever he does, it can be of no injury to his subject nor ought he by any of them to be accused of injustice. If the sovereign does 'wrong', the subject ought not to accuse anyone but himself. Those that have sovereign power may

³⁴⁰ *Ibid*: Part II, Ch. 28, 168.

³⁴¹ *Ibid*: Part II, Ch. 21, 112.

³⁴² *Ibid*: Part II, Ch.26, 153.

³⁴³ *Ibid*: Part II, Ch. 31, 189.

³⁴⁴ *Ibid*: Part II, Ch. 31, 189.

³⁴⁵ *Ibid*: Part II, Ch. 24, 131.

³⁴⁶ *Supra*: Hobbes *Leviathan* reprinted from the edition of 1651, Part III, Ch. 42, 448.

commit iniquity but not injustice or injury. No man with sovereign power can properly be put to death or otherwise punished by his subject.³⁴⁷

S: It is difficult for a subject to comprehend how the sovereign may perpetrate a breach of covenant with total impunity from earthly sanction

R: If you are referring to the covenant between every man and every man, by which the Commonwealth was instituted, you must recall that the sovereign was never a party to that compact.³⁴⁸ As such, he has no obligations under it. His only duty, common to all men, is to God and the Laws of Nature.³⁴⁹ For breach of any such obligation to God or under the Laws of Nature, he must answer in a higher place, but not to his subjects here on earth. Nor can the subject justify disobedience on the basis of a covenant with God, for there is no covenant with God but through the mediation of the sovereign.³⁵⁰

S: I deduce from what you say that the means, that is, the establishment and preservation of peace are determined by Nature or God, but the power to make men use those means, is in every nation resigned to the civil sovereign by the Law of Nature that forbids men to violate their faith.³⁵¹

R: That is so. Order is preserved through the fear of disobedience to the sovereign. Indeed, *'fear is the most likely of man's passions likely to induce him to keep the law'³⁵² and men that are once possessed of an opinion that obedience to the sovereign will be more hurtful to them than their disobedience, will disobey the laws and overthrow the Commonwealth. This will introduce the confusion and civil war for the avoidance whereof all civil government was ordained.*³⁵³

³⁴⁷ *Supra*: Hobbes *The Leviathan*, Part II, Ch.17, 91.

³⁴⁸ *Ibid*: Hobbes *The Leviathan*, Part II, Ch. 17, 91.

³⁴⁹ *Supra*: Hobbes *Leviathan* reprinted from the edition of 1651, Part III, Ch. 42, 407, 409.

³⁵⁰ *Supra*: Hobbes *The Leviathan*, Part II, Ch. 17, 91.

³⁵¹ *Supra*: Hobbes *Leviathan*, reprinted from the edition of 1651, Part III, Ch. 42, 451.

³⁵² *Supra*: Hobbes *The Leviathan*, Part II, Ch. 27, 158.

³⁵³ *Supra*: Hobbes *Leviathan* reprinted from the edition of 1651, Part III, Ch. 42, 421.

The lingering enigma

As illustrated in the above theoretical discourse, Hobbes exhibits supreme ingenuity in devising a system of positive law, effectively liberated from any practical interference from pre-existing 'higher' norms. Yet, does this establish the excision of every trace of natural law? It would seem not. Unlike modern legal positivism - promulgated in its most rigorous form by Hans Kelsen, where every legal norm is traceable to an empirically verifiable, hypothetical norm - Hobbes still rests his entire positive legal system on natural law foundations, imbued with universalistic and absolutist features.³⁵⁴ Derivation from the fundamental and transcendental Law of Nature as the supreme norm, in itself, suffices to divest Hobbes' work of any strictly positivist categorisation. But neither does Hobbes appear to subscribe to the traditional natural law perspective wherein positive norms must always be compliant with pre-existing tenets of equity, fairness and other 'moral virtues'. Further, even were such congruence within his political scheme evinced, Hobbes manifestly confers upon the individual subject, safeguards more apparent than real. His political and legal philosophy therefore emerges as a hybrid between natural law and positivism; a point of transition between the mandatory conformity of positive law to an ethical code of rectitude and compliance with the unchallengeable dictates of an authoritarian state. In short, Hobbes ostensibly embraces numerous characteristics of natural law ideology but then proceeds to distort them into a '*gigantic obedience machine*':³⁵⁵

'Hobbes destroys the theory of the right to resistance with its own weapons and defends the theory of obedience with the very arguments that had been used to destroy it. It enables Hobbes to reinforce rather than break the chains of absolutism.'³⁵⁶ Instead of natural law being the foundation of the right of resistance, it becomes the foundation of absolute obedience.'³⁵⁷

Integration and utilisation of the principal doctrinal components of natural law theory to eradicate or neutralise every right of resistance to the state, are arguably antithetical to those values located at the very heart of Hobbes' Laws of Nature. Indeed, his theory of the state encompasses but simultaneously nullifies *many* aspects of natural law

³⁵⁴ *Supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 132: 'His positive legal system is not self-sufficient but legitimated by pre-existing rational or natural order'.

³⁵⁵ *Ibid*: 171.

³⁵⁶ *Ibid*: 94.

³⁵⁷ *Ibid*: 123.

ideology. This culminates in ‘*an authoritarian solution*’.³⁵⁸ Transposed to the 20th century, Hobbes would have regarded a constitutional ‘democracy’ of the type attempted in Weimar Germany doomed from the outset. From a Hobbesian perspective, the 1919 Constitution would have comprised a bewildering array of rights against the state; a proliferation of law-making organs; in short a surfeit of individual freedom accompanied by a dearth of sovereign control. But at least in his somewhat naive belief in the inherent ethical propriety of the sovereign, Hobbes possesses a vestige of conceptual weaponry to deploy against any ruler wholly indifferent to the safety of the people under his governance. On a Hobbesian view, Nazi Germany would have comprised a regime, merely masquerading as a state.³⁵⁹ Because homogeneity does not feature in Hobbes’ system, the duty to protect *all* the people is unequivocal. Further, where the state fails in this obligation, it sacrifices the designation of a Commonwealth. If passive neglect for its subjects suffices to eliminate their duty of obeisance, this is exponentially increased where the state is an active instrument of their persecution. Reciprocity of obedience and protection are not contingent but fundamental to the very existence of the state.³⁶⁰

In the final analysis, the complexity of Hobbes’ approach towards individual rights is perhaps best captured in the triadic synopsis of recognition/conferral; expropriation and restoration:

- Recognition/conferral: on the institution of the Commonwealth, the subject is permitted to retain or is re-accorded one natural right - self-preservation.³⁶¹

³⁵⁸*Supra*: Dyzenhaus ‘Now the machine Runs itself’, 1-19.

³⁵⁹*Supra*: Mc.Cormick Carl Schmitt’s Critique of Liberalism Against Politics as Technology (Cambridge, Cambridge University Press, 1997), 277: ‘Even in Hobbesian terms, the Nazi state was no sovereign state but a pervertedly powerful form of the state of nature where no one is sure if he or she is the friend or enemy to fellow citizens or to the regime, constituted as it is, by an irresponsibly, destructive, particularist group of fanatics’.

³⁶⁰ This marks a striking divergence between Hobbesian and Schmittian theory as does their respective stances towards homogeneity. On these points, see *infra*: section 6.

³⁶¹ According to Strauss, it is this right of self-preservation, indeed to the ‘securing of life, pure and simple... of the individual’s *claim* that takes precedence over the state and determines its purpose and limits,’ that ‘sets the path to whole system of human rights in the sense of liberalism’ even if ‘this foundation does not make such a course necessary. Hobbes differs from developed liberalism only, but certainly, by his knowing and seeing *against what* the liberal idea of civilisation has to be persistently fought for: not merely against rotten institutions, against the evil will of a ruling class but against the natural evil of man; in an unliberal world, Hobbes forges ahead to lay the foundation of liberalism against the unliberal nature of man. Hobbes, *in view of* the state of nature, attempts to overcome the state of nature within the limits in which it allows of being overcome’: Leo B Strauss *Notes on The Concept of the Political* appended to Heinrich Meier *Carl Schmitt and Leo Strauss: the hidden dialogue* (Chicago

- Expropriation: the subject is denied any substantive sanction against the sovereign for infringement of either this natural right or indeed any other asserted ‘injustice’ perpetrated by the sovereign. Retention or acquisition of individual ‘rights’ is, thus, chiefly superfluous as long as the state subsists.
- Restoration: individual liberty is dormant rather than extinct for should the duty of protection owed its subjects be violated, the state ceases to exist as a sovereign institution. The individual then recovers all rights that prevailed in the state of nature.

Notwithstanding Hobbes’ emphasis upon sovereign command, some residual constraints upon rampant authoritarianism do, therefore, survive. The individual ought not to be expected to endure within a Commonwealth that affords no protection, nor is this demanded of him. Hobbes permits those privileges that belong to Man by right in the state of nature and to which natural law doctrine affords cognition and respect to survive the establishment and demise of the sovereign State. To this end, it is arguably *natural law*, rather than *positivism* that provides the conceptual justification for the non-recognition or cessation of duplicitous governmental regimes. Whether Hobbes would have regarded the Allied assumption of sovereignty within Germany, in the aftermath of WWII, as a valid Commonwealth is moot.³⁶²

Pending extrapolation of any significant disparities or congruence between the diagnostic approaches of Schmitt and Hobbes, two men separated in time but perhaps not equally disparate in ideology, discussion of the extent to which Hobbes’ politico-legal philosophy and theory of the state impinge upon the specific issues posed by retrospectivity is deferred to Chapter 5. As will subsequently emerge, a complex hybrid of both natural law and positivist elements imbue Hobbes’ stance towards the *ex post facto* utilisation of criminal law and punishment. Hardly surprisingly, perhaps, given the confluence of the two contrasting jurisprudential traditions within his legal and political

and London: The University of Chicago Press, 1995) 110-111, trans. J. Harvey Lomax from *Carl Schmitt, Leo Strauss und “Der Begriff des Politischen”*: *Zu einem Dialog unter Abwesenden*, 1988.

³⁶² If valid, this would be a Commonwealth by acquisition: ‘where the sovereign power is acquired by force; And it is acquired by force when men singly or many together by plurality of voices, for fear of death, or bonds, do authorise all the actions of that Man, or Assembly, that hath their lives and liberty in his Power’: *supra*: Hobbes *The Leviathan*, Part II, Ch. 20, 104.

philosophy, Hobbes asserts in the full passage of relevance drawn from Chapter 27 of his *Leviathan*:³⁶³

‘No law, made after a fact done, can make it a crime:³⁶⁴ because if the fact be made against the law of nature, the law was before the fact and a positive law cannot be taken notice of it before it was made and therefore cannot be obligatory. But when the law that forbids a fact is made before the fact, yet he that does the fact is liable for the penalty ordained after, in case no lesser penalty was made known before, neither by writing or by example.’³⁶⁵ (author’s underlining)

Though detailed analysis of Hobbes’ approach towards the retrospective application of legal rules is postponed, does his residual adherence to natural law principles effectively diminish his oft-vaunted positivistic condemnation of *ex post facto* criminal law? It remains to be seen whether this lingering allegiance to the ‘law of nature’ is ultimately crucial to the retrospectivity debate.

³⁶³ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 105, n.24: ‘The concluding Chapter 27 [of *Leviathan*] contains the first modern establishment of the phrase *nulla poena sine lege*’.

³⁶⁴ This extract: ‘No law, made after a fact done, can make it a crime’, is quoted in isolation *supra*: this section.

³⁶⁵ *Supra*: Hobbes *The Leviathan*, Part II, Ch. 27, 155.

Handing over the baton

Hobbes' legacy survives in various guises, not least through the interpretative filter of Carl Schmitt. To this extent, his state philosophy remains vibrant and relevant some 350 years after his death. Its longevity relies upon its seductive potency in formulating an apparent panacea for the suppression of social unrest. Indeed, in an effort to quell civil disorder and to concentrate power in one indivisible sovereign entity, the Hobbes of 17th century England perhaps proffered '*the most serious attempt to reduce law to positive law ever made in a cultural environment where no one had ever contested the validity and existence of natural law*'.³⁶⁶ However, his authoritarian construct of the state was deemed wholly incompatible with the English yearning for constitutional government and parliamentary supremacy. Within his homeland, execration and a tarnished reputation were, therefore, Hobbes' contemporaneous deserts.

Despite this ignominious reception, his theories were, according to Schmitt, to see a revival some 150 years later, both in the positivism of John Austin and the utilitarianism of Jeremy Bentham: '*men who prepared the way for the liberal Rule of Law*'.³⁶⁷ Further, against the backdrop of the golden age of legal positivism and the subsequent Weimar years in Germany, the early part of the 20th Century was to bear witness to Schmitt's dramatic appropriation and radicalisation of Hobbes' theory of the state:

'He (Schmitt) argued in radical historicist fashion that political cultures and political theologies were exclusively keyed to particular epochs. Yet he insisted with no less firmness that the vacillation between order and disorder was a recurrent historical phenomenon and that the lessons of earlier political teachers were necessary to understand one's own era.'³⁶⁸

In light of Hobbes' distinctive contribution to political and jurisprudential theory, it is to the post-WWI work of Carl Schmitt that focus now shifts.

³⁶⁶ *Supra*: Norberto Bobbio *Thomas Hobbes and the Natural Law Tradition*, 133.

³⁶⁷ Carl Schmitt, 'Die Vollendete Reformation: Bemerkungen und Hindweise zu neuen Leviathan-Interpretationen', *Der Staat* Vol. 4 (1965), 51, 59 in Gershon Weiler *From Absolutism to Totalitarianism* (Durango, Colorado: Hollowbrook Publishing, 1994), 156.

³⁶⁸ *Supra*: Gottfried Carl Schmitt *Politics and Theory*, 7.

Section 6: the Schmittian skein

Schmitt makes a blurred photograph into his version of a sharp one though such an act may destroy the likeness of the original.³⁶⁹

The analytical challenge

As Carl Schmitt embarks upon his chequered journey through Weimar Germany, his legal and political theory unfolds via a multiplicity of threads, each with a distinctive hue and texture.³⁷⁰ Only in the death throes of the Republic, however, does the skein that comprises the sum of the individual disparate strands attain fruition. It is with this theoretical exposition that this segment is primarily concerned. If Schmitt lauds his distant predecessor, Thomas Hobbes, ‘*as a true teacher of a great political experience*’;³⁷¹ a forceful exponent of polemics, undiminished by the passage of time, which, if any, of Hobbes’ jurisprudential devices and doctrinal arguments does Carl Schmitt invoke in the synthesis of his own theoretical convolutions? Is it his purported allegiance to Hobbes or his unique response to empirical factors and influences that ultimately propel him to the very brink of disaster? As intimated, Hobbes develops his ostensible antipathy towards the retrospective deployment of criminal penalisation against the backcloth of his complex amalgam of natural law tenets and positivistic authoritarianism. But destined to develop to academic maturity in the shadow of what he deemed the ‘*bourgeois liberal state*’³⁷² created by the 1919 Reich Constitution, is Schmitt any more accessible to precise evaluation?

Paramount, to Schmitt, is *his* immediate concrete reality, as selectively filtered through the medium of the incipient decisionist tendencies evinced during the late 1910s. From his contemporaneous perspective, the future is occluded and uncertain. As he casts his gaze, he responds not to immutable tenets forged in the annals of time but rather to the exigencies of the moment in the augmentation, revision or depletion of his theoretical

³⁶⁹ This is Wittgenstein’s appraisal of Schmitt’s radicalisation of Hobbes, as cited *supra*: Weiler *From Absolutism to Totalitarianism*, 121. The veracity of Wittgenstein’s assessment is explored further in this section.

³⁷⁰ The Schmittian skein is written chiefly in the present tense as if Schmitt were surveying his concrete reality, other than where this is precluded by an account of actual historical events; where allusions are made to earlier texts or to the theories that Schmitt was to unfold at a later date when the tense usage is altered accordingly.

³⁷¹ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 86

³⁷² This conceptualisation is fully discussed *inter alia* in Carl Schmitt *Constitutional Theory* (Durham and London: Duke University Press, 2008) trans. and ed. Jeffrey Seitzer from *Verfassungslehre* (Berlin: Duncker & Humblot, 1928).

bundle. It is this temporally-bound dimension to his philosophical horizon that *prima facie* precludes recourse to natural law doctrine.³⁷³ Within Schmitt's amoral scheme, the concrete transcends the metaphysical. If it is true that Schmitt repudiates natural law as a disingenuous charade for the furtherance of factionalised self-interest³⁷⁴ but then condemns positive law as the spurious legitimation of a '*specific status quo whose political power or economic advantage would stabilise itself in the law*',³⁷⁵ to what tenets, if any, *does* he subscribe?³⁷⁶

Always jurisprudentially difficult to situate, Schmitt compounds this theoretical ambiguity by his predilection for the reactive formulation of effective countermeasures born from the prevailing concrete circumstances. This engenders a philosophy in perpetual flux. Indeed, his '*gift for conceptual formulations that are simultaneously lucid and suggestive, along with at times surprising caginess about his own intentions, combine to frustrate efforts at easy ideological categorisation*'.³⁷⁷ What this suggests is that neither Schmitt's declared or implicit attitude towards the issue of retrospectivity may be effectively evaluated without elucidation of the multiplicity of jurisprudential strands that seemingly define his legal and political philosophy. For example:

- (i) To what extent, if any, does Schmitt affirm or reject the natural law tradition?
- (ii) Is his polemic against legal positivism entirely candid or is he more indebted to the positivistic method than he cares to concede?
- (iii) If Schmitt either repudiates or, in contrast, embraces the retrospective utilisation of criminal law, is this explicable or indeed capable of rationalisation from a natural law position, a positivist stance, both or

³⁷³ The validity of this presumption is explored further *infra*: Chapter 5.

³⁷⁴ See *supra*: Schmitt *The Concept of the Political*, 66, where Schmitt posits that recourse to a so-called higher law is a façade for what is, in truth, 'the rule or sovereignty of men or groups who can appeal to this higher law and thereby decide its content and by whom it should be applied'; here Schmitt specifically cites Hobbes as authority for his ostensible rejection of natural law doctrine. Whether this is correct is the subject of the discussion in Chapter 5.

³⁷⁵ *Supra*: Schmitt *The Concept of the Political*, 66, where it is clear that Schmitt is dismissive of the conceptualisation of 'law' as a body of '*existing positive laws and law-giving methods*', that, in his view, reduce the rule of law to nothing more than preservation of the *status quo*.

³⁷⁶ Sandrine Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt' *History of European Ideas* Volume 35, Issue 3, (September 2009), 369-381: 'Stressing the importance of political decisions, Schmitt ranked among the most virulent anti-positivists of the period'; on this point, see William Rasch *Sovereignty and its Discontents* (London: Birkbeck Law Press, 2004), 26-27: 'Despite his famous Catholicism, he does not call for a return to an ancient, medieval or early modern version of natural law. Carl Schmitt, in other words, is no Leo Strauss. He does not attempt to save philosophy from the mathematical ravages of modern rationality by posting a classical unity of the True and the Good; rather, he accepts the demise of natural law and ponders the limits of legality in a positivist age'.

³⁷⁷ *Supra*: Seitzer 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis', 203-224.

neither? Or if this form of external critique, ultimately, forestalls evaluation of Schmitt's subjective and, possibly, selective interpretation of these diverse jurisprudential traditions, is such approach insufficiently nuanced to address the complexities inherent within Schmitt's philosophy?

- (iv) From an *external* standpoint, to what extent does Schmitt's occasional explicit digression into the sphere of retroactively utilised criminal law correspond wholly, or in part, with his legal and political theory? Is such inquiry, however, little more than an exercise in futility, if predicated upon a frustratingly elusive degree of consistency within Schmitt's legal and political theory?
- (v) Considered *immanently* – rather than externally - and assessed over an extended spectrum of time, do fundamental disparities exist between Schmitt's articulated forays into retrospectively-deployed criminal law and the legal and political philosophy he appears to espouse?
- (vi) On a related theme, even where sporadic inconsistencies do occur within Schmitt's vaunted stance towards the legitimacy of *ex post facto* legislative provisions, is each divergent response nonetheless immanently reconcilable? In the event, for example, that such vagaries in approach arise from a pragmatic or imperative reaction to a disparate range of concrete circumstances, does this render Schmitt's ostensible lack of constancy more apparent than real?

Suffused with contradiction and complexity, does Schmitt's work ultimately evidence any transition from diagnostic disapprobation into ameliorative prognosis? Or is it valid to designate him a deconstructionist and arch-polemicist, whose work is '*dazzling rather than illuminating*'?³⁷⁸ Does he create '*too many shadows*'?³⁷⁹ In short, is he predisposed to the '*arresting phrase over analytical argument*';³⁸⁰ is it feasible to extrapolate from his Weimar writings any recurrent themes that elicit his particular ire, approbation or preoccupation and to what extent do these influence his perspective to the *legality* principle?

³⁷⁸ Jan-Werner Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 9.

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*: 51.

The 'why': the iron and golden threads

Significant in the extreme, for Schmitt, is the socio-political backdrop to his work but does this allegiance to the demands of the concrete reality imply that his contemporaneous passage through the previously uncharted terrain of pre-Nazi Germany lacks compelling focus? Perhaps not, for indispensable to the structural coherency of his skein are two threads at its epicentre: the one, golden, ever constant and shimmering with Schmitt's exaltation of 'politics' over 'law',³⁸¹ the other, iron, and laden with corrosive polemical potential.³⁸² Together, these comprise the intractable spindle around which the substance of his theoretical skein is wound: Article 48 and its conferral upon the *Reichspräsident* of 'emergency powers,'³⁸³ interlocked in bitter confrontation with legal positivism, instantiated in the form of the liberal constitutional state (*Rechtsstaat*).³⁸⁴ What Schmitt deems to be the un-harnessed potentiality of Article 48, he adroitly uses to berate and deride the fatal flaws he detects within value-neutral legal positivism.³⁸⁵ In turn, he exploits the perceived deficiencies of a

³⁸¹ This is, in essence, decisionism, 'a conception of political decisions that transcends law'. On this point see: *supra*: Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', 369-381

³⁸² See *supra*: Schmitt *On the Three Types of Juristic Thought*, 102, n.6: Schmitt reads the *Rechtsstaat* as 'a state which is symbolised completely by *Recht*, whose supreme will is not *Rex* but *Lex*; a commonwealth where the relationships of individuals to each other but above all to the supreme power are governed by legal maxims, where therefore governing and being governed proceed according to *Recht* and not according to the *tel est notre plaisir* of the governing persons....Law appears as a power, which is likewise set above the will of the governed as well as the governing person'.

³⁸³ Interpretation of this constitutional provision, in relation to both ambit and deployment, influences much of Schmitt's Weimar work.

³⁸⁴ On the definition of *Rechtsstaat* here and synonymous with Schmitt's own usage, see *supra*: Schmitt *On the Three Types of Juristic Thought*, 101, n.4, '*Rechtsstaat* is one of those terms best left in the original because of the various connotations it has depending on the historical, ideological and political contexts in which writers, especially political and legal theorists, have used it over the past two centuries. In its most basic form, a *Rechtsstaat* implies a type of constitutional state that guarantees fundamental civil liberties of speech, press, religion, equality before the law and so on. It usually involves a government based upon the consent of the governed and the separation of power as a means of protection against arbitrary or oppressive government. Despite varying interpretations, changing political alignments and compromises with other political currents and the power of the Prussian state, and then the unified *Reich* of the 1871, the *Rechtsstaat* has remained the cherished political goal of German liberalism since the eighteenth century'.

³⁸⁵ As will emerge, Schmitt determines to systematically dismantle various aspects elemental to 'legal positivism' - especially that of the Kelsenian variety (which to Schmitt is nothing more than a 'deteriorated and self-contradictory normativism': Carl Schmitt *Preface to Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Massachusetts: MIT Press, 1985) trans. George Schwab from *Politische Theologie*, 1922 (Berlin: Duncker & Humblot, 1934), 3, drawing upon one of Schmitt's themes in *supra*: *On the Three Types of Juristic Thought*. See also *supra*: Scheuerman *The End of Law*, 68, 'For Schmitt, the essence of liberal constitutionalism is best captured by a term that he uses in an undeniably deprecatory fashion throughout his writings: *normativism*. Schmitt claims that liberals have always sought to subject political power to a system of *norms*, to some type of rule-based regulation'; this invokes the question of whether sufficient similarities exist between them to suggest that Schmitt is,

positivistic mode of thought to extol the sublime presidential authority, purportedly accorded by Article 48.

perhaps, a covert positivist because though ‘determined to break with positivism, he nonetheless remained attached to some of its defining claims’; on this point see *supra*: Seitzer *Introduction to Constitutional Theory*, 24; on the origin of the legal system from the respective stance of Schmitt and Kelsen, see *supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy*, xix: ‘If they repudiate the existence of a transcendent God, what serves as their point of legitimation?’

The iron thread unchained

Throughout the Weimar period, it is Schmitt's searing invective against the notion of a legal system based upon a closed system of norms that comprises the *iron thread* pervading his work. Exemplified in its most stringent form by the rigidly scientific normativism of Hans Kelsen,³⁸⁶ at the heart of this system is the conviction that '*the state and all its organs are bound by the law*'³⁸⁷ and are accordingly '*restricted by the legal system as a whole*'.³⁸⁸ This antipathy towards '*cohesion of the state [as] exclusively the result of a collective submission to the rules*' aside,³⁸⁹ Schmitt agrees

³⁸⁶ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 46: 'the theoretical object of legal science was the state conceived as a unified system of legal rules: the general rules of enacting and concretising general rules via procedurally correct decisions and nothing else'.

³⁸⁷ Anke Freckmann and Thomas Wegerich *The German Legal System* (London: Sweet and Maxwell, 1999), 59; see also *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 66: 'The so-called constitutional state is a state based on law because the historically concrete order state, links itself with "right" transforming itself into the "law" of the state'.

³⁸⁸ *Ibid*: Freckmann and Wegerich, 59; see Paul Gottfried *Carl Schmitt Politics and Theory* (New York and London: Greenwood Press, 1990), 59, where Gottfried queries whether 'Schmitt would have been a decisionist had Kelsen not been a normativist'; also *supra*: Schwab *The Challenge of the Exception*, 44, 'Schmitt's decisionism derives its meaning from his polemics against Kelsen's normativism'; see also Gary Ulmen *Introduction to Roman Catholicism and Political Form* (Westport: Greenwood Press, 1996) trans. Gary Ulmen from *Römischer Katholizismus und politische Form*, 1923, xxxii n.31: 'Schmitt's concept of decisionism is developed in and through his critique of normativism, a doctrine consistent with legal positivism'; also *supra*: Sandrine Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', 369-381, 'The dualism between state and law was, for Kelsen, a politico-legal abuse that allows political means to contradict the positive law. The state ruled its activity in such a way that the juridical and the state spheres are not dissociated. This is the main implication of Kelsen's monist doctrine of the state. From this perspective, the origin of the state can only be normative, which excludes sociological, political or religious foundation'; also *supra*: Seitzer *Introduction to Constitutional Theory*, 5-6:

- (i) 'The state has an irreducibly normative character with reality independent of law and no voluntaristic force or identity other than its unity with the law (integral to this is its neutrality and objectivity or, in Schmittian terminology, its depoliticisation)
- (ii) The normative form of the state is derived from an exclusively ideal realm of norms, distinct from and unaffected by natural or sociological facts. Material, historical or social processes that influence the constitution of a state or juristic construction of a state are therefore irrelevant
- (iii) All personalistic or voluntaristic attempts to found a doctrine of political sovereignty must be repudiated. The state is founded upon an objective norm and not the subjective will of a sovereign entity.

³⁸⁹ See also: *supra*: Sandrine Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', 369-381: 'Kelsen always concluded his texts in the same ways: by asserting the impossibility of making a clear distinction between state and law'; see also *supra*: Seitzer *Introduction to Constitutional Theory*, 12: 'Kelsen's drafts for the Austrian constitution, anchored in the assumption that the constitution forms a closed system of norms applied by a constitutional court and that these norms provide a basis for the regulation of all political activity and social conflict, clearly took positivist conceptions of purity in law to a new degree of refinement'; see Hans Kelsen *General Theory of the Law and State* (Cambridge: Massachusetts, 1945), 11, 'The reason for the validity of a norm is always a norm, not a fact. The quest for the reason for the validity of a norm leads back not to reality but to another norm from which the first norm is derivable'; see *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 65: 'Because the state of the absolute prince was bound by virtue of law, and transformed from a power-and-police state into a "constitutional state" [*Rechtssaat*], law, too, changed and became a technical means to tame the leviathan to 'put a hook into the nose of the Leviathan. It became a technical instrument that was intended to make calculable the

that, ‘the idea of subordination to a general “inviolable” norm is the cornerstone of all *Rechtsstaat* thinking’.³⁹⁰ Embedded within this are the dual guarantees of *fidelity* and *certainty* that coincide with the repudiation of retroactive legislation: the capacity of state citizenry to trust implicitly in the acts or omissions of state organs and to accurately forecast developments in the law:³⁹¹

‘The *ex post facto* prohibition is generally understood by jurists as an application of the principle of “legality”, “*Rechtsstaat*”, or the “rule of law”, a pervasive principle that embodies the moral ideals of law.’³⁹²

The principle of *nullum crimen, nulla poena* is, therefore, as indispensable to the *Rechtsstaat* concept as the primacy of the general norm and, to this extent the Reich Constitution was no exception.³⁹³ This presumption Schmitt freely concedes, in his allusion to Locke’s *Rechtsstaat* classic formulation that the validity of law rests upon ‘*previously established law (antecedent, standing positive laws) while all ex post facto laws are contrary to law*’.³⁹⁴ If then the by-product of Schmitt’s Weimar productions is the neutralisation of quintessential components of the *Rechtsstaat* – in particular, the doctrine of separation of powers and the publicly promulgated, pre-established general norm – does this necessarily imply his collateral acquiescence in, or embrace of, *ex post facto* penalisation? Accurate evaluation of the second question accordingly appears to

administration of state power. General legalisation is the main feature of this development and the state itself changes into a positivist system of legality’.

³⁹⁰ *Supra*: Schmitt *Constitutional Theory*; see also *supra*:Schmitt *The Crisis of Parliamentary Democracy*, 42: ‘Representatives of *Rechtsstaat* thinking believe that the general has a higher value, in itself, than the particular’.

³⁹¹ This is recognised in the post-war 1949 German Constitution (still in force), Article 103 II of which, comprises a total restriction on retroactive legislation in criminal law.

³⁹² *Supra*: Paulson ‘Classical Legal Positivism at Nuremberg’, 132-158. The potential conflict between the primacy of positive law and the demands imposed by the *ex post facto* doctrine are seemingly obviated when the written Constitution textually embodies an embargo on the use of *ex post facto law*, as was the case with Article 116 of the Reich Constitution 1919.

³⁹³ Because of its ambiguous wording, Article 116 is semantically open to varying interpretations. A discussion of this, together with Schmitt’s overt or implicit approach to retrospectivity is reserved to Chapter 5. Here is one possible translation of the many ostensibly possible: ‘An act can only be punishable if its penalty was fixed by law before the act was committed’.

³⁹⁴ *Supra*: Schmitt *Constitutional Theory*, 182. This issue is considered further *infra*: Chapter 5; *supra*: Holmes *The Anatomy of Antiliberalism*, 50: ‘Since Hobbes’ intellectual descendants include Pufendorf and Bentham, Hobbes must be considered the progenitor of the bourgeois *Rechtsstaat* with its fundamental norm of *nulla poena sine lege*’; see also *supra*: Schmitt *On the Three Types of Juristic Thought*, 106-7, n. 30: Schmitt here endorses his earlier definition of a legislative state, propounded in *Legality and Legitimacy* (1932): ‘A legislative state is a political system governed by impersonal, therefore, general and predetermined norms that are considered for the duration to have measurable and determinable content, in which law and the execution of law are separated from each other’. He then concurs with a 1934 treatise by H Henkel, *Strafichter und Gesetz in neuen Staat*, in which in Schmitt’s view, Henkel, with perfect clarity, elucidated the ‘historical and systematic connection of the phrase, *nulla poena sine lege* with the legality system of the legislative state’.

rest upon detailed dissection of the first and it is with the exposition of his assault against the ‘rule of law’ state that the ensuing sections partially focus. Relatedly, which *theoretical* strands does the Weimar-era Schmitt elect to plait into his complex politico-legal skein, and with what ultimate impact upon the viability of the liberal constitutional state?³⁹⁵

³⁹⁵ See *supra*: Schmitt *Constitutional Theory*, 64, where Schmitt states that Kelsen’s theory ‘becomes understandable when one sees it as the final product of the genuine theory of the bourgeois Rechtsstaat, which sought to make a legal order out of the state and perceives in it the essence of the Rechtsstaat’; also *supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxiv, ‘The legislative state assumes a strict separation between the law and its application and therefore between the parliament and the administration, the legislative and the executive. [The norms must] refrain from targeting specific individuals or groups and seldom apply to circumstances retrospectively’.

The first glistenings of the golden thread

Article 48 of the Reich Constitution, the same provision responsible, in part, for an array of unforeseen - but arguably foreseeable – deprivations upon the Weimar Republic, perversely comprises the *golden thread* infusing much of Schmitt’s Weimar work. This segment, therefore, seeks to explore how Article 48 – or a specific interpretation of it - dovetails with the embryonic decisionist theory that, in a refined and mature form, so tellingly pervades his writings during the instability of the 1920s and early 1930s? Which facets within, or extrinsic to, the Constitution enable Schmitt to render ‘*the institutional implications of Article 48 more explicit*’ and to provide ‘*these implications with a theoretical foundation more congenial to the minds of authoritarian politicians*’ or, indeed, more appropriately attuned to the unique challenges the 1930s posed?³⁹⁶ And why does he espouse the ‘*presidential system*’, of Article 48 within the Constitution over the ‘*purely parliamentary one*’?³⁹⁷

The essence of this contest resides in the duality between Articles 68 and 48.³⁹⁸ The former prescribes that: ‘*Reich laws shall be enacted by the Reichstag.*’ As such, it is the responsibility of the legislative organ of government to pass law in the form of statutes, the bedrock of the legal-positivist constitutional state:

‘The statute is formally defined as a legal rule that is abstract and binding on everyone, enacted by the responsible legal bodies in formal legal proceedings and published in accordance with the law.’³⁹⁹

In contrast, Article 48 recognises that where ‘*public safety and order in the German Reich are considerably disturbed or endangered*’ the President, elected by the ‘*whole*

³⁹⁶ *Supra*: Seitzer *Introduction to Constitutional Theory*, 25.

³⁹⁷ *Supra*: Schmitt *Constitutional Theory*, 316.

³⁹⁸ Here, in microcosmic form, appeared the antagonistic dichotomy between the traditionally liberal emphasis on separation of powers/ legislative independence (Article 68) and the more authoritarian elements, resting on executive autonomy purportedly authenticated *inter alia* by the ‘democratic will’ of the people (Article 48).

³⁹⁹ *Supra*: Freckmann and Wegerich *The German Legal System*, 32. See *supra*: Caldwell, ‘Legal Positivism and Weimar Democracy’, 273- 301: ‘The dominant form of legal theory in the pre-war era was statutory legal positivism. Shaped in the second half of the 19th century by Von Gerber and Laband and represented in the Weimar period by Anschütz and others, statutory legal positivists viewed formal statutes of the duly constituted Reichstag as the sole source of law. Other forms of law, such as customary law, which were given priority in previous eras, were clearly subordinate to formal statutes during the Reich. And if formal statutes were passed according to established procedure, they were valid regardless of their substantive content’.

German people’,⁴⁰⁰ may ‘take such measures as are necessary to restore public safety and order.’⁴⁰¹ Controversially, the President is also empowered to ‘temporarily suspend, either partially or wholly, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124 and 153’.⁴⁰² With this explicit privileging of presidential authority, Article 48 is *prima facie* inconsistent with the doctrine of separation of powers, quintessential to the liberal rule-of-law type state.⁴⁰³ Also at potential variance with the spirit of the *Rechtsstaat* is the encroachment on individual rights, implicit within this provision. How then does Schmitt specifically bring to the fore and manipulate the full potentiality of Article 48, arguably an ‘invitation to abuse’ conferring a ‘dangerously open-ended authorisation’.⁴⁰⁴ Does the very existence of Article 48 ‘obstruct the work of the Reichstag’⁴⁰⁵ and undermine the legal-constitutional spine of the Weimar Republic?⁴⁰⁶ Or is it purely through the medium of Schmitt’s ostensibly perverse interpretation of it that this consequence ensues?⁴⁰⁷ An account of

⁴⁰⁰ Article 41

⁴⁰¹ See Article 48 (2). Article 48 (1) states: ‘if a Land fails to fulfil the duties incumbent upon it according to the Constitution of the Laws of the Reich, the Reich President can do so with the aid of armed forces’

⁴⁰² These were the same Articles of the Weimar Constitution specifically abrogated by the Nazis in the ‘Decree of the President of the Reich for the Protection of the People and the State’ dated 28th February 1933 (Article 109: inviolability of personal freedom; Article 114: inviolability of the home; Article 115: privacy of mail, telegraph and telephone; Article 117: freedom of opinion and the press; Article 123: freedom of assembly; Article 124: freedom of association; Article 153: inviolability of private property). On this point see *supra*: Schwab *The Challenge of the Exception*, 102. Articles 5, 15, 17 and 19 were also formally abrogated by a Nazi decree dated 7th April, 1933, which Schmitt helped to formulate. This law eliminated the problem of federalism by subordinating the state governments to the Reich: *ibid*: 104.

⁴⁰³ Liberal regimes have to periodically confront the reality of the ‘emergency situation’ and deal with it by the creation of appropriate ‘emergency powers’. What was perhaps unusual about the 1919 Constitution was the attempt to enshrine such powers within the Constitution itself. See *supra*: Schmitt *Legality and Legitimacy*, 88, where Schmitt ridicules the French for having a constitution that inheres within it no extraordinary lawmaker (such as a President with emergency powers), though he concedes that it is, at least, consistent with its liberal parliamentary character, even if it exists without a fundamental will. Mc. Cormick alludes to Schmitt’s derision at the failure of the United States Constitution to have a clearly enumerated provision for emergency situations. This, Schmitt regards as a powerful testament to liberal dereliction to deal effectively with the emergency situation: see *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 150.

⁴⁰⁴ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 31.

⁴⁰⁵ *Supra*: Freckmann and Wegerich *The German Legal System*, 24.

⁴⁰⁶ The 1919 Weimar Constitution is divided into Parts 1 and 2 the first section more entrenched in characteristically ‘democratic’ principles and the second containing Basic Rights more reflective of a traditional *Rechtsstaat*.

⁴⁰⁷ Notably, neither his empirical nor theoretical allegiance to this provision ever waned. Schmitt, therefore, continued to assert the utility of Article 48, even in the face of his paradoxical contention that the Nazi Enabling Act 1933 represented ‘the provisional constitution of the German revolution’ and ‘the genesis of a new legal and political order’: Carl Schmitt *Das Reichsstaathaltergesetz* (Berlin, 1933), in Joseph W Bendersky *Carl Schmitt: Theorist for the Reich* (Princeton, New Jersey: Princeton University Press, 1983), 198. See also Carl Schmitt *Das Gesetz zur Behebung der Not von Volk und Reich* (Deutsche Juristen-Zeitung), Jg. 38, Heft 7 (April 1, 1933) *ibid*: Bendersky, 197: ‘The Enabling Act is a revolutionary change in the nature of the constitution itself, as decisive as the revolution of 1918. Schmitt thus claimed that the Enabling Act was much more than a revolutionary constitutional amendment or a temporary emergency provision’; see also Peter Caldwell, *Popular Sovereignty and the Crisis of Weimar*

his interpretation of Article 48, as developed in conjunction with his political and legal theory, appears below.

Constitutionalism (Durham and London: Duke University Press, 1997), 174: ‘The Enabling Act, of 23 March 1933, implemented a permanent state of emergency. The permanent state of emergency was paradoxically institutionalised by the Nazis’; see also Kempner’s interrogation of Schmitt during the preamble to the Nuremberg Trials in Robert Kempner ‘Interrogation of Carl Schmitt I-III’ *TELOS* No. 72, (Summer 1987), 97-107. Here Schmitt commented upon the fundamental ‘abnormality of the whole National Socialist regime’ – a system which he asserted contained ‘no binding norms and institutions and in which everything it did or announced was always subject to change’. Significantly, the majority of the 1919 Constitution, including Article 116, was never formally abrogated by the Nazis: on this point see *supra*: Bendersky *Carl Schmitt: Theorist for the Reich*, 198; also *supra*: Schwab *The Challenge of the Exception*, 105.

⁴⁰⁷ *Supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 266.

Elucidation of the golden thread: Article 48 under scrutiny

‘Schmitt lent his intellectual support to the attempts of successive authoritarian chancellors, Brüning, Papen and Schleicher to usurp the power of parliament and govern through the charismatically and plebiscitarily elected office of Reichspräsident Hindenburg.’⁴⁰⁸

It is worth remembering that Schmitt was among those who sought to strengthen the Weimar regime by trying to persuade Hindenburg to invoke the temporary dictatorial powers of Article 48 against extremes on right and left.⁴⁰⁹

Illustrated by these extracts, the contribution of Article 48 towards the downfall of the Weimar Republic is laced with controversy, as is Schmitt’s uniquely-formulated analysis of it.⁴¹⁰ As seen, this provision empowers the president to take such emergency measures as are necessary to safeguard the public safety and order of the state and crucial, for Schmitt, is the decision (or lack of decision) on the part of the *Reichstag* to leave un-circumscribed its precise scope and application. This, he interprets as tacit recognition of the inherent scope for flexibility within the exercise of presidential discretion as commensurate with the demands the prevailing political situation imposes:⁴¹¹

⁴⁰⁸ *Supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 266; at the same time, it should be noted that the Reichstag was effectively deadlocked by the combined negative majority of Communists and Nazis.

⁴⁰⁹ Paul Piccone and Gary Ulmen ‘Reading and misreading Schmitt’ *TELOS* No. 74, (Winter 1987-88), 133-140

⁴¹⁰ Article 48 reads as follows:

- (1) If a Land fails to fulfil the duties incumbent upon it according to the Constitution or the laws of the Reich, the Reich President can force it to do so with the help of the armed forces.
- (2) The Reich President may, if the public safety and order in the German Reich are considerably disturbed or endangered, take such measures as are necessary to restore public safety and order and if necessary may intervene with the help of the armed forces. For this purpose he may temporarily suspend, either partially or wholly, the Fundamental Rights established in Articles 114, 115, 117, 118, 123, 124 and 153.
- (3) The Reich President shall inform the Reichstag without delay of all measures taken under Paragraph 1 or Paragraph 2 of this Article. On demand by the Reichstag the measures shall be repealed.
- (4) In case of imminent danger, the government of any Land may take preliminary measures of the nature described in Paragraph 2 for its own territory. The measures are to be revoked upon the demand of the Reich President or the Reichstag.
- (5) Details will be regulated by a Reich law

⁴¹¹ This, Schmitt elucidated in some detail, during a Convention of Jurists at Jena. His presentation was published as ‘*Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Rechtsverfassung*’, as an Appendix to *Die Diktatur* (1924 edition); *Die Diktatur* was initially published in 1921. Schmitt’s utilisation of the concept of dictatorship, as explicated during the Weimar period, appears *infra*: this Chapter.

‘Schmitt argued that the provisory situation resulting from section 5 of Article 48 had received a positive content, as a result of non-existence of a special law.’⁴¹²

Only in his later work do the specifically constitutional aspects of his analysis develop, as does his emphasis upon the charismatically endowed presidential leader.⁴¹³ At his stage, the crux of his ingenious de-formalised interpretation primarily rests on historical-legalistic arguments centring upon the extent to which the second sentence of 48(2) is intended to delimit the first sentence of this particular section. These, Schmitt contends, are augmented by the drafting history of the salient portions of Article 48. In essence, Schmitt claims that the state of emergency will evade effective control if the second sentence of 48(2) is permitted to circumscribe the flexibility of presidential power conferred in the first sentence. If the President is able only to suspend the seven fundamental rights enumerated in the second sentence, this fetters his discretion to an unwarranted extent.

Crucially, the initial part of the second sentence: ‘*for this purpose*’ does not imply that the President is restricted to the suspension of those sections of the Constitution, expressly ordained susceptible to sublation. The principle: *enumeratio ergo limitatio* is, therefore, not decisive.⁴¹⁴ Integral to ‘*a particular liberal logic that attempts to cope with a need to limit extraordinary powers*’,⁴¹⁵ a literal interpretation of 48(2) is anathema to Schmitt. It is indicative of a liberal mode of thought, intent on controlling every aspect of the emergency situation in a manner wholly incompatible with the demands of real life.⁴¹⁶ The correct parsing of 48(2), for Schmitt is, therefore, as follows:

‘For the purpose of re-establishing public security and order, the Reichspresident can undertake measures and he may suspend basic rights in order to achieve the purpose in the concrete case.’

⁴¹² Carl Schmitt, ‘Die staatsrechtliche Bedeutung der Notverordnung insbesondere ihre Rechtsgültigkeit’, *Verfassungsrechtliche Aufsätze* (1931), 238 in George Schwab *The Challenge of the Exception* (New York: Greenwood Press, 1989), 84

⁴¹³ Elucidation of Schmitt’s legal-constitutional position, vis-à-vis Article 48, emerges *supra*: *Constitutional Theory* and is fully discussed *infra*: this Chapter.

⁴¹⁴ This is the principle, whereby the only way to make sense of an express statutory enumeration, is to interpret it as an intention to limit activity under the statute to the enumerated items.

⁴¹⁵ David Dyzenhaus *Legality and Legitimacy* (Oxford: Oxford University Press, 1997), 72ff.

⁴¹⁶ Schmitt breathes new life into his controversial interpretation of Article 48 as late as 1932, at a time when the Republic was already in its death throes. See *supra*: Schmitt *Legality and Legitimacy*, 67ff.

Totally at variance with the interpretation of 48(2) adopted by the majority of other constitutional lawyers of the age,⁴¹⁷ Schmitt asserts that his re-arrangement of this provision and insertion of additional wording can be justified by reliance upon the drafting history:

‘On January 3, 1919, Preuss had drawn up the original section which read: “The Reichspresident can intervene ...with the aid of armed force and undertake necessary measures to restore public security and order.” The second sentence starting with: “For this purpose...” was drawn up by a different committee and was attached to the original version of sentence 1. On July 5, 1919, the phrase dealing with armed force was relegated to the last part of sentence 1 “because one did not want to mention the most extreme measure first...” But sentence 2 remained unchanged. Thus, “for this purpose...” does not mean: in order to intervene with the aid of armed force. But for the same reason, it also does not mean: in order to undertake necessary measures. But it does mean: to restore public security and order.’⁴¹⁸

The zeal with which Schmitt re-interprets Article 48 is, perhaps, born of an anxiety to maximise the discretionary powers vested in the President; this, to a level commensurate with the unrest bedevilling the Republic. His mission to promote executive authority appears measured and deliberate, motivated by an abiding determination to suppress the mayhem that he fears will otherwise erupt. What emerges is the production of a thesis ‘*nearer the facts than was the strict and legalistic point of view*’.⁴¹⁹ However, this is seemingly achieved at the expense of every traditional interpretative convention. Though no single reading of a legislative provision is self-evidently valid, Schmitt’s construal of Article 48 nonetheless culminates in a mutant variation of Article 48, arguably beyond the contemplation of the original founders of the Constitution. This has potentially retrospective connotations to which Schmitt is either oblivious (though this probably does him a disservice) or in relation to which he is entirely sanguine. For whenever interpretation of a statutory provision strays beyond any of the initially conjectured parameters and, accordingly, contrary to the reasonable expectations of those who seek to place reliance upon a conventional reading of it, those to whom it relates are inevitably affected by its deployment in a different manner than originally envisaged.⁴²⁰

⁴¹⁷ *Supra*: Schwab *The Challenge of the Exception*, 39, n. 37. It was the commonly held view of Anschutz and others that only a strictly legalistic interpretation was appropriate. Thus, ‘with the exception of the seven articles that may be suspended, the other one hundred and seventy three articles of the constitution were sacrosanct.’ The only dissenting voice, other than Schmitt, was Jacobi.

⁴¹⁸ *Supra*: Schwab *The Challenge of the Exception*, 39.

⁴¹⁹ Clinton L. Rossiter *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948), 69.

⁴²⁰ This is considered further in the study of Schmitt’s stance towards retrospectivity *infra*: Chapter 5.

What ultimately lies at the heart of the startling interpretative licence Schmitt elects to deploy towards Article 48 is his intriguing conceptualisation of the nature and scope of ‘dictatorship’. Because the roles of dictator and president are, to Schmitt, synonymous, the president *is*, for however brief or extended a period, a dictator. In essence, therefore, what precise purpose does presidential/dictatorial authority serve? Is the president confined to a *temporary* suspension of constitutional norms or is it feasible for all legal checks and balances to be *permanently* abrogated? In Schmitt’s appropriated terminology is presidential authority ‘sovereign’ or merely ‘commissarial’ and what implications, if any, does he perceive flow from this distinction?⁴²¹

⁴²¹ Schmitt takes the distinction between sovereignty and dictatorship of the commissarial variety from J Bodin *Les six Livres de la Republique* (2nd French edition Chez Jacques du Puys, 1580), 122-123 cited *supra*: Schwab *The Challenge of the Exception*, 30.

Dictatorship dissected: commissarial and sovereign dictatorship – the ‘what’ and the ‘how long’

What follows is analysis of Schmitt’s conceptualisation of sovereign and commissarial dictatorship from a primarily legal-constitutional rather than social-scientific perspective. Akin to other thematic strands infusing his work, rarely does Schmitt clarify whether he intends his account of dictatorship to be read as prescriptive rather than purely descriptive. Is he seeking to postulate what is, in his view, indispensable to the agenda he seeks to pursue or merely to diagnose empirically verifiable facets of the concrete reality which confronts him? Elements of both arguably pervade his legal and political theory. Seldom, however, is it easy to dispel the suspicion that Schmitt’s paramount concern is to address, or from his perspective ameliorate, the disorder *he* perceives to exist. If this requires resort to unconstrained or circumscribed dictatorship, this is a prospect that Schmitt appears to embrace or at least concede as an ineluctable solution to the ‘chaos’ that would otherwise proliferate. Whether he ultimately *affirms* dictatorship is, perhaps, less telling than his manifest willingness to instrumentalise authoritarian rule - even in its most draconian form - to confront threats to whatever governmental regime he strives to uphold and preserve.⁴²²

Key to Schmitt’s empirical Weimar promotion of Article 48 is his theoretical elucidation of the concept of dictatorship and it is this he explores in *Die Dikatur (DD)*, written in 1921.⁴²³ Here, he draws upon an earlier essay, of 1917, where he explored the then occluded distinction he detected between the erroneously-assimilated concepts of ‘military dictatorship’ and the ‘state of siege’.⁴²⁴ Schmitt speculated that it was within the institutional prerogative of the military dictator to confer legislative authority upon

⁴²² This is explored further below in this Chapter in the specific context of Schmitt’s demolition of the principle of ‘equal chance’ embedded within the Weimar Constitution. Here Schmitt advocated the exercise of emergency powers by the President beyond the constitutional constraints permitted by Article 48 of the Constitution, ostensibly in an effort to preserve the Republic against the dual threats of Communism and Nazism. This was clearly deemed a preferable option than permitting either the factions of the ‘left’ or ‘right’ to seize the equal chance accorded by the Constitution to destroy the rights and freedoms enshrined within it.

⁴²³ *Die Dikatur* (Munich: Duncker & Humblot, 1921).

⁴²⁴ ‘Dikatur und Belagerungszustand: Eine staatsrechtliche Studie’, (Dictatorship and State of Siege) *Zeitschrift für die gesamte Strafrechtswissenschaft* 38 (1917) cited *supra*: Scheuerman *The End of Law*, 30; *supra*: Mc.Cormick, *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 127; also Peter Caldwell, *Popular Sovereignty and the Crisis of Weimar Constitutionalism* (Durham and London: Duke University Press, 1997), 56. Mc. Cormick asserts that Caldwell may ‘too baldly read back Schmitt’s later more extreme authoritarianism into this early work’; *ibid*: Mc.Cormick, 127, n. 9.

his own office. Hence, the military dictator could entirely suspend the separation between legislature and executive. Most dramatically, the concept of dictatorship implied a total identification of legislative and executive. ‘Measures’ of the executive became equivalent, in material terms, to ‘laws’ of the legislature. Predicated upon the capacity of the state to respond swiftly and emphatically within a situation of wartime crisis, Schmitt was acutely aware of the advantages inherent within military dictatorship to address the demands of the concrete situation.

Yet, at that stage, he acknowledged an alternative solution of an ostensibly more subtle and moderate nature. In stark contrast to military dictatorship, it was a manipulated variant of the state of siege that proved amenable to this possibility. This ‘*empowered the military to carry out measures necessary to fulfil a limited concrete task.*’⁴²⁵ For the purpose of such circumscribed and designated function, the legislature contingently delegated requisite administrative authority to the military commander to enable him to suspend certain rights. Whilst the separation of powers between legislative and executive organs remained technically undisturbed, authority converged within the executive to facilitate an appropriate response to the exigencies of the moment - a state of emergency:

‘Under the state of siege, a concentration takes place within the executive while the separation between legislation and execution is maintained; under dictatorship, the difference between legislation and execution continues to exist but the separation is removed insofar as the same authority has control of both decree and execution of laws.’⁴²⁶

This signified an incipient willingness to bridge, if not fuse, the gap between executive and legislative organs of the state. Whilst hesitant about the unequivocal obliteration of separation of powers, Schmitt was determined to vest the executive with sufficient autonomous ‘law-making capacity’ to safeguard the integrity of the state. Ultimately inconclusive as to his preference for ‘*legislature to take over executive or vice versa*’,⁴²⁷ the ramifications of this early venture into the sphere of dictatorship were, nonetheless, explosive. As Caldwell observes, ‘*Schmitt played havoc with the positivist style of interpretation. He pushed the opposition between theory and practice, between validity*

⁴²⁵ Peter Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism* (Durham and London: Duke University Press, 1997), 56.

⁴²⁶ ‘*Diktatur und Belagerungszustand: Eine staatsrechtliche Studie*’, (Dictatorship and State of Siege) *Zeitschrift für die gesamte Strafrechtswissenschaft* 38 (1917), 156 in *ibid*: Caldwell, 56.

⁴²⁷ *Ibid*: Caldwell, 60.

and effectiveness, constitution and administration to a head'.⁴²⁸ Even in 1917, Schmitt was conscious that the demands of the prevailing political situation exposed the inadequacy and fragility of the positive legal norm.⁴²⁹ What did this departure from traditional positivist scholarship augur for the future? The diversion of power to the executive, at the expense of the legislative, certainly prefigured possible complicity in the temporary suspension or permanent abrogation of legal-constitutional norms. To what extent, therefore, was Schmitt subsequently minded to develop this early acclamation of executive power and how did this dovetail with his notion of sovereign and commissarial dictatorship?

In his 1921 *DD*, Schmitt newly aspires to distinguish between traditional dictatorship of the type exercised by a sovereign prince (like Sulla and Caesar in Roman times) and a more properly conceived notion of dictatorship *derived* from the sovereign. Similar to the '*classical Roman institution of dictatorship*',⁴³⁰ this latter is enjoyed only on 'commission' from the sovereign entity.⁴³¹ Power of a commissarial dictator is envisioned as delimited in time and scope in accordance with the specific task for which the delegation is made. Neither perpetual nor absolute, dictatorship is ostensibly temporary and circumscribed. It is purely during the tenure of the dictator's office that legal norms are suspended and the entire rationale for the commissarial dictator is to preserve and defend the existing constitution against extra or anti-constitutional threats to it, not to abrogate it. Once the emergency has passed, the 'normal state' is restored. Against the background of the Article 48 exercise of emergency powers by President Ebert, Schmitt therefore still discerns concrete success in terms of a '*return to law*'.⁴³²

⁴²⁸ *Ibid*: 61.

⁴²⁹ This was a period of intense turmoil, witnessing the Russian Revolution and within Germany the momentous upheavals caused by World War I.

⁴³⁰ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 123.

⁴³¹ Mc.Cormick posits that the suspension of the rule of law by the classical institution of dictatorship 'did not have the now-indispensable notion of rights to grapple with...It is far less convincing to argue that it is necessary to suspend or violate rights in order ultimately to uphold them'; *supra*: John Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 155. According to Mc.Cormick, when Schmitt formulates his notion of commissarial dictatorship, he overlooks the merit of classical dictatorship whereby 'the normal institution that decides that an exceptional situation exists (for example, the Roman Senate) itself chooses the one who acts to address that situation (for instance the dictator through the consuls). This external authorisation on the execution of emergency powers works simultaneously as a check on, and compensation for, the relinquisher of power who declares an emergency, as well as a potentially astute selection device for the executor on the exception': *ibid*: Mc. Cormick, 154.

⁴³² *Die Dikatur* (Munich: Duncker & Humblot, 1989), xvi in John Mc.Cormick, *Carl Schmitt's Critique of Liberalism Against Politics as Technology* (Cambridge: Cambridge University Press, 1997), 124.

This is in stark contrast with the metier of sovereign dictatorship that '*sees in the total existing order the situation which it seeks to do away with through its actions; to create a condition whereby a constitution which it considers to be a true constitution will become possible*'.⁴³³

Schmitt sees his variant of commissarial dictatorship - and its correlation with Article 48 discretion - as a vibrant and indispensable institution. Only through the flexible and discretionary nature of this office is stability assured. Whatever entity is vested with executive authority has the power to decide what legal measures are required and thereafter both to create and control their implementation. During a state of emergency, no place exists for strict demarcation between executive and legislative arms of government. In contrast, though professedly focussed on the attainment of equilibrium, the separation of powers doctrine creates discord and insecurity. Neither the *Rechtsstaat* nor legal positivism is equipped to respond adequately to a concrete threat to the integrity of the state; in short, to distinguish between right and wrong. How, therefore, is it feasible for either to guarantee existential survival? These perceived ideological deficiencies induce Schmitt to castigate liberals, amongst them Kelsen, for their tendency to become hamstrung by the Caesaristic notion of dictatorship. Because liberals deem that the sole function of a dictator is to *destroy*, rather than preserve, the properly constituted legal system, the dictator is an interloper; a destroyer who must be kept at bay. Liberals fail to grasp the utility and import of dictatorship in its commissarial form. This is, in Schmitt's view, due to their insistence upon demonising all non-liberal alternatives contrary to the ideology they seek to promote:

'[For liberal positivists], the problem of dictatorship has as much to do with a legal problem, as a brain operation had to do with a logical problem. This is as a result of a relativistic formalism that misunderstands that dictatorship deals with something else entirely, namely that the authority of the state cannot be separated from its value.'⁴³⁴

Akin in many respects to Schmitt's earlier conceptualisation of the state of siege, why should Kelsen and his adherents be so fearful of a condition - commissarial dictatorship - in which constitutional norms are merely suspended but not permanently abrogated? This is the essence of Article 48: an imperative, if temporary, response to a concrete

⁴³³ *Die Dikatur* (Munich: Duncker & Humblot, 1921), 137 cited *supra*: Schwab *The Challenge of the Exception*, 35; sovereign dictatorship is exemplified by regimes of the age such as fascism and Leninism.

⁴³⁴ *Die Dikatur* (Munich: Duncker & Humblot, 1989), xix cited *supra*: Mc.Cormick *Schmitt's Critique of Liberalism Against Politics as Technology*, 127.

emergency.⁴³⁵ Not the unlimited power of a prince throughout an indefinite duration of time to perpetuate that power (as with Hobbes' sovereign) but rather '*the exercise of similarly unrestricted power in extraordinary circumstances to bring about the termination of that power*'.⁴³⁶ However, it is what Schmitt's explication of commissarial dictatorship in *DD* presages that justifies the alarm attendant upon the exercise of emergency powers. For 'authority', at one moment temporally and substantively circumscribed, is only too readily transmutable into untrammelled power to overturn an entire constitutionally established regime. If this occurs, are not all problematic legal norms, not least of them any enshrined embargos against the retrospective deployment of criminal law, likewise vulnerable to super-session?

Destined to further inflame the qualms of legal positivists, Schmitt demonstrates the ease of this fateful transition in *Political Theology (PT)*, written just one year after *Die Diktatur*.⁴³⁷ Here, the dictator is seemingly, if perhaps not consistently, elevated from commissarial to sovereign status.⁴³⁸ In Schmitt's view, '*Article 48 grants unlimited power*' to the President to deal with '*public safety and order in the German Reich*'.⁴³⁹ Though this could be read as implicitly restricting presidential authority to deal with the threat to the nation and its constitution, nowhere in *PT* does Schmitt clarify this to be his intention. Instead, his newly-conceived and more radical stance towards the ambit of Article 48, is evident in his assertion that, '*the preconditions as well as the content of a jurisdictional competence in such a case (the state of emergency envisaged by Article 48), must necessarily be unlimited*'⁴⁴⁰ (author's underlining). Schmitt compounds this affinity with the notion of unrestrained power by insisting that the entire question of

⁴³⁵ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 107: according to Caldwell, commissarial dictatorship connotes that the written constitution remains in force throughout, rather than undergoing any period of suspension. 'The constitution delegates and delimits even the most extraordinary authority. Dictatorship, according to Article 48, is itself subordinate to the sovereign constitution.'

⁴³⁶ *Die Diktatur* (Munich: Duncker & Humblot, 1989), 7 cited *supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 130.

⁴³⁷ *Ibid*: Mc.Cormick, 139: Gone from Schmitt's writings after *Die Diktatur* are the neo-Kantian attempts to keep his authoritarian tendencies within a rule of law framework that characterises his earlier writings and governs the moderating impulses of most of that book.' *Ibid*: 156, 'The transition from *Die Diktatur* to *Political Theology* indicates a shift from conservatism to fascism in Schmitt's theory'.

⁴³⁸ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 49: 'The modest figure of the classical commissarial dictator to whom Schmitt had given the task of saving society in *Die Diktatur* was transformed in *Political Theology* into a punitive dictatorial regime whose 'sovereign' would take on an eschatological significance after the age of legitimate monarchy'.

⁴³⁹ *Supra*: Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*, 8.

⁴⁴⁰ *Supra*: Schmitt *Political Theology*, 7.

sovereignty would become less significant ‘if measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers’.⁴⁴¹ Despite the explicit constitutional conferral of Article 48 powers, Schmitt eschews the idea of commissarial dictatorship and in the process, seemingly appropriates a quasi-Hobbesian approach towards the role of the sovereign dictator.⁴⁴² But is sovereign dictatorship too incendiary a notion for Schmitt to control? Does he, therefore, retrench from this intensely authoritarian stance to avoid an insidious and unwarranted incursion into his theoretical skein?⁴⁴³

Schmitt’s 1924 essay (*D2*)⁴⁴⁴ heralds an apparent reversal in his leanings towards sovereign dictatorship. Clearly cognisant of the moves afoot to press for the enactment of Article 48(5) laws with which to circumscribe the operation of 48(2), Schmitt reverts to his notion of commissarial dictatorship.⁴⁴⁵ Anxious to allay fears about the potentially unlimited scope of presidential authority, he asserts that:

‘A sovereign dictatorship is irreconcilable with the constitution of a Rechtsstaat. A republican constitution would be entirely provisional and precarious in the hands of a sovereign dictator. Either sovereign dictatorship or constitution: one excludes the other.’⁴⁴⁶

Unequivocal though this appears as to the repudiation of sovereign dictatorship, what does this imply about the nature of its commissarial counterpart? If ‘*emergency measures issued on the basis of Article 48 are perforce of a commissarial nature,*’ does this necessarily signify a relinquishment of Schmitt’s quest to extend the ambit of presidential latitude?⁴⁴⁷ Perhaps so, for at the core of presidential power Schmitt argues

⁴⁴¹ *Ibid.*: 12.

⁴⁴² *Supra*: Wolin ‘Carl Schmitt, political existentialism and the total state’, 389-416: ‘Schmitt’s paper-thin distinction between commissarial and sovereign dictatorship had fallen by the wayside by *Political Theology*’.

⁴⁴³ It may also be that Schmitt was seeking to address the challenges presented by the concrete reality with which he was confronted.

⁴⁴⁴ *Supra*: Schmitt ‘*Die Diktatur*’. *Die Diktatur* was initially published in 1921.

⁴⁴⁵ On the historical context surrounding Schmitt’s apparently revised position, see *supra*: Bendersky *Carl Schmitt Theorist for the Reich*, 76-84.

⁴⁴⁶ *Supra*: ‘*Die Diktatur*’ in *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 40.

⁴⁴⁷ Considerable dispute reigns about Schmitt’s attitude towards sovereign and commissarial dictatorship. Balakrishnan believes that, by 1924, Schmitt had definitely reverted to commissarial dictatorship: *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 40. Bendersky and Schwab imply that Schmitt advocated commissarial dictatorship in 1924 and had never departed from this position, even in *Political Theology* (1922). See respectively *supra*: Bendersky *Carl Schmitt Theorist for the Reich*, 74 -84 and *supra*: Schwab *The Challenge of the Exception*, 31ff. Mc. Cormick asserts: ‘there is little scholarly consensus on the exact moment of Schmitt’s conversion to sovereign dictatorship. Cristi locates it in *Die*

the case for ‘*an organisational minimum*’.⁴⁴⁸ Hence, the President is unable to utilise Article 48 to extend the tenure of his office or to abolish it entirely. Likewise, the Reichschancellor and Reichstag must continue as institutions to enable them to exercise their fundamental constitutional functions, including those encompassed within Article 48 itself. Further, Schmitt reserves to the Reichstag the sole prerogative of making ‘laws’ in accordance with Article 68 of the Constitution.

Disquieting, however, is Schmitt’s insistence that within the purview of the president rests the capacity to introduce ‘measures’ of an altogether more *ad hoc* nature. This invokes inquiry into when, precisely, this conjectured presidential intervention is to assume primacy over the legislature. Does Schmitt require the legislative authority of the Reichstag invariably to *succumb* to Article 48 measures during an emergency situation? If so, there appears but one authority adequately equipped to deal with exigent circumstances in the context *inter alia* of parliamentary deadlock: that of the executive. Does this imply, therefore, that the procedurally-compliant general norm has no application to chaos? In such event, Reichstag-enacted ‘law’ would retain no validity outside a condition of normalcy. This summary curtailment of legislative authority is arguably of little moment as long as Schmitt explicitly concedes that ‘*action has to be directed at restoring the particular constitution which is endangered*’.⁴⁴⁹ Convergence of power within the executive, with the attendant marginalisation of legislative authority, never obtrudes beyond the ambit of the temporally circumscribed emergency situation. Temporary circumvention of the Reichstag is not, therefore, tantamount to its permanent abrogation, in that re-instigation of normalcy always heralds the resurrection of legislative authority from enforced dormancy. To the extent, therefore, that Schmitt acknowledges this vital dichotomy between legislative and executive authority during periods of *stability* - though tellingly, not of *emergency* – the doctrine of separation of

Diktatur (1921) whereas Stanley Paulson dates it even after the 1924 Article 48 essay’: *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 121 n. 22. Mc. Cormick himself is of the view that Schmitt appears to subscribe to the notion of commissarial dictatorship, though is disingenuous about his real intentions. This stance is shared by David Dyzenhaus. On this point, see *supra*: Dyzenhaus *Legality and Legitimacy*, 80

⁴⁴⁸ ‘*Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Rechtsverfassung*’, published as an Appendix to *Die Diktatur* (1924 ed.), 246ff in *supra*: Schwab *The Challenge of the Exception*, 41.

⁴⁴⁹ On this point, see *inter alia supra*: Dyzenhaus *Legality and Legitimacy*, 72ff and *supra*: Bendersky *Carl Schmitt Theorist for the Reich*, 74 -84.

power dangles by a thread. But is this reprieve for, perhaps, the most crucial buttress of the *Rechtsstaat* merely transitory?⁴⁵⁰

*Constitutional Theory (CT)*⁴⁵¹ contains what purports to be a soothing elucidation of the concepts of sovereign and commissarial dictatorship. Schmitt affirms the latter whilst maintaining his renunciation of the first. But this attempt to mollify his critics and assuage suspicions about his intentions is arguably doomed to failure. Commencing with an assertion that commissarial dictatorship occurs ‘*within a framework of constitutional norms by which dictatorship remains limited by already existing and formulated constitutional laws*’, he insists that ‘*if not so restrained, it is sovereign*’.⁴⁵² So far, this engenders no additional concern. Provided that the president is obligated to restore *in toto* all those constitutional norms that are overstepped during the state of emergency, the future of the rule-of-law state is secure. But is this what Schmitt intends? Why does he allude to the *crisis* against which the Constitution originally came into being and the *decision* that galvanised its instigation and formulation.⁴⁵³ When Schmitt refers to the commissarial obligation of the dictator, is he mandating the president to uphold the re-invigorated legal norms embodied within the textual constitution (the individual ‘constitutional laws’)? Or does he conversely subscribe to a conceptualisation of the ‘constitution’ with more ominous implications for the *Rechtsstaat*? Sovereign dictatorship may not always strive to conceal its intention to abrogate the pre-existing legal order. But whether its commissarial counterpart, with its vaunted commitment to the restoration of constitutional norms, is more effective in preserving the constitutional-law type state remains to be seen. In short, the distinction between sovereign and commissarial dictatorship appears, at first glance, decisive: the one abrogates the pre-existing constitution, the other preserves it. However, from the perspective of the *Rechtsstaat*, is the outcome similarly insidious?⁴⁵⁴

⁴⁵⁰ See *supra*: Schmitt *Legality and Legitimacy*, 1932 for the high watermark of Schmitt’s pre-Nazi denunciation of the legal-constitutional state; also *supra*: Schmitt *On the Three Types of Juristic Thought*, 79, where Schmitt categorises the ‘liberal doctrine of separation of powers’ as ‘the foundation of the liberal *Rechtsstaat*’; *ibid*: 82 where he speaks of ‘the doctrine of separation of powers which separates justice and administration’ and *ibid*: 94, where he refers to the need to ‘overcome a normativism based on the earlier principle of separation of powers’.

⁴⁵¹ *Supra*: Schmitt *Constitutional Theory*.

⁴⁵² *Ibid*: 10.

⁴⁵³ See *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 142-143.

⁴⁵⁴ Schmitt’s conceptualisation of the ‘constitution’, as rendered explicit in his 1928 *Constitutional Theory*, is discussed further *infra*: this Chapter.

One further sting in the tail exists within *CT*, for Schmitt contrives to re-define *commissarial dictatorship*; effectively to re-conceptualise his own earlier prescription. No longer must a commissarial dictator be appointed by the sovereign body in conformity with a stipulated procedure.⁴⁵⁵ Now, a dictator may be regarded as commissarial rather than sovereign provided that his authority is putatively derived *from* ‘the people’. All that is required is for such person to act ‘*in the name of and under commission from the people*’.⁴⁵⁶ But how may this type of commission be objectively verified or validated?⁴⁵⁷ Is a democratically elected commissarial dictator more or less regressive than a counterpart nominated in accordance with parliamentary procedures which entirely bypass the populace? With what norms, if any, is the dictator bound to comply and, critically, to which legal system and institutional framework is the dictator obliged to revert? Dressed in seemingly innocuous attire, is Schmitt’s analysis actually a strategic euphemism for the glorification of unregulated brute power? The key to this, perhaps, lies in his bleak “manipulation” of Article 48 during the early 1930s.

Indeed, it was shortly prior to the Nazi ascent to power that the escalating political turmoil enabled Schmitt to more actively deploy his earlier, largely theoretical position on Article 48. In 1930, severe economic pressures impelled the President to institute requisite policies through emergency presidential decrees. Given the Reichstag’s previous rejection of these initiatives the presidential exercise of Article 48 discretion, in this context, was especially significant. In his *Gutachten* (consultant’s report), Schmitt upholds the validity of such disputed decrees on the basis that they aim to restore the existing constitutional system, not to abrogate it.⁴⁵⁸ The president is acting in a commissarial, not a sovereign capacity. But crucially, unless and until countermanded by the Reichstag, such measures are tantamount to formal laws; nominally measures, they acquire the status of statutes during the period that intervenes between propagation and negation. Though arguably confined to the emergency situation, this represents an erosion of the distinction between executive and legislative organs and with it the concomitant incursion into the separation of powers doctrine. Given this elision of the traditional contrast between legislative statute and administrative measure, how does it

⁴⁵⁵ As with Article 48 itself, where delegation of power to the President and the procedure for the election of the President are explicitly ordained in the Reich Constitution 1919.

⁴⁵⁶ *Supra*: Schmitt *Constitutional Theory*, 110.

⁴⁵⁷ Schmitt’s utilisation of the ‘myth of the people’ to underpin his concept of democracy is explored further, *infra*: this Chapter.

⁴⁵⁸ On this point, see *supra*: Seitzer *Introduction to Constitutional Theory*, 21.

remain plausible for Schmitt to contend that presidential authority is purely commissarial? For within which parameters, if any, does the state of emergency commence or endure and what is its feasible duration?

This is a development with yet wider significance. Where every *ad hoc* situational measure is capable of potentially permanent elevation to the sanctity and status of a generally applicable publicly promulgated norm, this possesses the potential to impair the integrity of the entire legal order. Schmitt does appear to recognise the significance of the distinction he endorses between ‘*a system of rules*’ encapsulated within the legal-constitutional *Rechtsstaat* and ‘*at all times valid*’, as opposed to measures produced by an executive-orientated governance that ‘*change with time and circumstances*’.⁴⁵⁹ But how may a citizen securely rely upon the relative stability of legal norms or the principle of non-retroactivity of law, where an executive measure is suddenly rendered equivalent to a legislative statute? The law-making process simply becomes too susceptible to the exigencies of the current situation; political and social volatility is fatally transposed into the juridical sphere, with catastrophic ramifications for the rule of law. Or does Schmitt simply seek to recognise the empirical reality that it is not always feasible to uphold the liberal rule of law in the face of an existential threat to the concrete integrity of a state? And is his stance more sustainable than his liberal-tended critics would care to concede in that ‘normal’ constitutional governance rarely endures unhindered in face of war, invasion and terrorism?

With the advent of the 1930s, Schmitt’s die is however cast. Within the powerful armoury afforded by Article 48, it is the president alone who can legitimately lay claim to the role of ‘guardian of the constitution’.⁴⁶⁰ Arguing against Kelsen’s adherence to the primacy of the judiciary via the institutional framework of a constitutional court,⁴⁶¹ Schmitt declares that the president alone possesses sufficient discretion and flexibility to

⁴⁵⁹ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 43; in this, Schmitt drew inspiration from Bolingbroke who formulated the contrast between a ‘government by constitution’ and ‘government by will’.

⁴⁶⁰ This is discussed in Carl Schmitt *Der Hüter der Verfassung (Guardian of the Constitution)* (Tübingen: J.C.B. Mohr Paul Siebeck, 1931), 7-9 (*HV*), in *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 143. No complete translation of *HV* has yet appeared in English.

⁴⁶¹ Hans Kelsen ‘Wer soll der Hüter der Verfassung sein?’ *Die Justiz* 6 (1930/31), in John Mc.Cormick, *Carl Schmitt’s Critique of Liberalism Against Politics as Technology* (Cambridge: Cambridge University Press, 1997), 144.

safeguard the integrity of the nation.⁴⁶² Whether this is predicated on sovereign or commissarial dictatorship is veiled, ‘*though the anticipated scope of presidential latitude appears to connote the authority to implement wide-ranging legal, political and social measures, beyond the confines of pre-existing constitutional norms*’.⁴⁶³ Irrespective of the label affixed to this type of dictatorial governance, Schmitt’s marginalisation of the legislative and judicial arms removes any feasible restraints upon executive authority. The president is now seemingly supreme.⁴⁶⁴ With this, Schmitt simultaneously pre-empts and, perhaps, even embraces Kelsen’s charge that ‘*he [Schmitt] reduces the whole constitution to the emergency powers of Article 48*’.⁴⁶⁵

The pinnacle of Schmitt’s advocated empirical application of presidential authority, under Article 48, was to occur in the Constitutional Court decision of *Prussia v Reich* (1932).⁴⁶⁶ This personal and professional triumph for Schmitt was, in many respects, prefigured by his prior acclamation of Article 48 in *Legality and Legitimacy (LL)* (1932).⁴⁶⁷ Here, in Schmitt’s sweeping sublimation of the rule of law, executive power attains its zenith. No longer is he concerned to conceal his underlying intentions beneath

⁴⁶² For Schmitt, because the judiciary acts *post factum*, it is always ‘politically speaking too late: *HV*, 32-3. His perhaps surprising denigration of judicial discretion in *HV* appears at variance with the overall tenor of his writings and is explored further *infra*: Chapter 4.

⁴⁶³ See *supra*: Dyzenhaus *Legality and Legitimacy*, 72.

⁴⁶⁴ *Supra*: Gottfried Carl Schmitt *Politics and Theory*, 28: ‘Schmitt defended Article 48 of the Constitution which provided for the exercise of emergency powers by the President when a threat to public disorder existed. Schmitt approved the assumption of commissarial dictatorship by President Paul von Hindenburg in May 1930. The use of Article 48 became even broader by the end of July when the Reichstag turned down Brüning’s budget proposals for the next year. Liberal jurists argued that the Reichstag had the right to judge both the scope and application of Article 48. They claimed that other provisions in the Constitution assigned greater power to the legislative rather than the executive branch of government. Such points came up in briefs against Schmitt and Hindenburg in 1931 and 1932. In a bitter rejoinder to the “Protector of the Constitution” Hans Kelsen, in 1931, scolded Schmitt as an enemy of liberal constitutionalism. Kelsen had suggested that because of his political associations, Schmitt had turned from criticising normativist legal theory to going after the republic. In Kelsen’s view, Schmitt was openly consorting with militarists and monarchists and using his scholarship to bring about a coup d’etat’. Gottfried appears somewhat charitable to Schmitt here in concluding that Schmitt is merely advocating commissarial dictatorship.

⁴⁶⁵ Hans Kelsen ‘Wer soll der Hüter der Verfassung sein?’ *Die Justiz* 6 (1930/31).

⁴⁶⁶ This is fully discussed *inter alia* in *supra*: Bendersky *Carl Schmitt Theorist for the Reich*, 154-164. In essence, this involved the validity of the exercise by Von Papen of presidential powers, conferred by Article 48, to intervene in the internal affairs of the SPD-dominated Prussian government. The Court delivered an ambivalent verdict which ordained that Papen’s actions were unconstitutional, whilst still leaving *in situ* a Reich Commissar to control Prussian affairs. In his submissions to the Court, Schmitt argued that the President was, in a political sense, the lawful defender of the constitution: ‘the formalities ...in this process before the supreme court are no mere formalities but very real political matters’: *Preussen contra Reich vor dem Staatsgerichtshof* 17 October 1932 (Berlin, 1932), 466-67. On the contrary, Schmitt’s opponents claimed that he ‘was elevating the president above the court in constitutional matters and subordinating law to politics’: *supra*: Bendersky, 164.

⁴⁶⁷ *Supra*: Schmitt *Legality and Legitimacy*, 1932.

a facade of moderation.⁴⁶⁸ The President is now elevated in stature to the third extraordinary lawgiver, not in the sense of *ratione materiae*, as is ‘the legislature’ with control over constitutional norms, nor *ratione suprematatis*, as is ‘the people’ with the capacity to decide directly. In contrast, the president is extraordinary *ratione tempore ac situationis*, that is, by virtue of time and circumstances.⁴⁶⁹ What is the exact scope of this peculiar authority to execute measures during a state of emergency? Whilst Article 48(3) may give the outward appearance of supremacy of the *Reichstag* over the *Reichspräsident*, this control is merely illusory. Despite the contents of this sub-clause, no reason exists to justify the position that the president is subordinate to the legislature. In truth, the conferral of ‘power’ upon the legislative organ to set aside (or revoke/repeal) the measures of the president necessarily implies that the actions of the latter are first in time. The president is entitled to instigate decrees, the validity of which the *Reichstag* is thereafter enjoined to consider. For Schmitt, therefore, the extraordinary lawmaker, empowered to act in an emergency situation, has ‘a head start’⁴⁷⁰ in the confrontation between executive and legislative branches.

Further, the *Reichstag* has no authority to act retroactively to invalidate measures already made by the president.⁴⁷¹ Such legislative negation only has prospective effect.⁴⁷² Where executive discretion is in issue, Schmitt disavows the feasibility of retroactive measures to counteract measures that the president deems appropriate to address the exigencies of the concrete emergency. In any event, the impact of armed intervention is, in practical terms, incapable of retrospective revocation. For example, if force of arms causes loss of life, personal injury and other irreparable damage, *post*

⁴⁶⁸ See *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 238: ‘The abstract domination by impersonal norms brought on by positivist jurisprudence is still in itself as intolerable for Schmitt as it was in *Political Theology*, but it is the new form of concrete domination whose way it paves that is the most dangerous aspect of such rule of norms here in *Legalität und Legitimität*. Abstract legality allows for seizing a state that is increasingly viewed as merely a power mechanism and not the site of the existential integration of the people’.

⁴⁶⁹ *Supra*: Schmitt *Legality and Legitimacy*, 69.

⁴⁷⁰ See *ibid*: 67ff for a detailed account of the deployment of Article 48 presidential powers and his conceptualisation of the extraordinary lawgiver it empowers.

⁴⁷¹ Here, Schmitt rejects the notion of retrospectivity, presumably on the basis that Article 48(3) should be read as: ‘set aside’ rather than ‘repeal’ or ‘revoke’.

⁴⁷² Practical constraints also existed upon the ability of the *Reichstag* to countermand measures of the President. See *supra*: Seitzer *Introduction to Constitutional Theory*, 27: ‘That the *Reichstag* can repeal emergency decrees is of little consequence in view of its chronic ineffectiveness. Besides, Schmitt argues that the President can dissolve the *Reichstag* even if this exceeds narrow limits, if he deems a non-confidence vote is merely an attempt at obstruction *supra*: Schmitt *Constitutional Theory*, 357-358]. This means that the president can effectively circumvent parliamentary control, as Schmitt suggested late in the Republic’.

factum denunciation of this type of presidential discretion by the *Reichstag* is futile. The President thus possesses a ‘*great factual superiority*’.⁴⁷³ Does Schmitt conceive this type of Article 48 dictatorship to be sovereign or commissarial? Evidently the former, since it is for the extraordinary lawgiver to determine both the presupposition of his powers and their content.⁴⁷⁴ Additionally, even where set aside (or revoked/repealed) in the interim by the legislature, nothing inhibits the reissue of identical measures. Because the president is under no obligation to preserve the established legal order, this facilitates prompt action in contravention of existing constitutional norms. Total de-formalisation holds the key to the potential flexibility of executive response.⁴⁷⁵ For Hobbes, an element of formality always resides in the creation of a valid law whilst, with Schmitt, any vestige of formalisation is extinguished:

‘Emergency powers allow the president to act without considering the juridical order, which makes him a supreme act of decision-making, an ‘infallible’ instance that is not controlled by anyone.’⁴⁷⁶

To compound the abjuration of any recognisable principle associated with the rule of law, Schmitt insists that every individual measure may acquire the character of a statute equivalent to a legislative enactment.⁴⁷⁷ For this drastic proposition, he seeks no further vindication than the accelerating political dysfunction of late-Weimar Germany, where the traditional distinction between statutes and measures has evaporated to vanishing point:⁴⁷⁸ ‘*the situation is so incalculable and so abnormal that the statutory norm is*

⁴⁷³ *Supra*: Schmitt *Legality and Legitimacy*, 69.

⁴⁷⁴ This echoes Schmitt’s position some ten years earlier in *supra*: *Political Theology*, 7.

⁴⁷⁵ *Supra*: Schmitt *Legality and Legitimacy*, 71. See William E Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Massachusetts: MIT Press, 1994), 274, n.39: ‘Schmitt dismisses a defence of the classical liberal norm in favour of a system of profoundly de-formalised ‘flexible’ law’.

⁴⁷⁶ *Supra*: Baume ‘On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt’, 369-381.

⁴⁷⁷ Interestingly, the corollary is not true. Though an executive measure is able, in certain circumstances, to attain the status of a legislative statute Schmitt wishes, nonetheless, to preserve the essential distinction of law and measure (laws are apposite during times of normalcy and measures during times of emergency). This is seemingly designed to prevent the issue of measures by the *Reichstag*. What he deems to be the advantage of a ‘measure’, in terms of flexibility and non-generality, he implicitly seems to wish to remain exclusively within the domain of the executive, namely the President; on this point see *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 147. Because, within Schmitt’s thesis, always lurks a dangerous equivalence between the exception and the norm, Mc.Cormick posits that Schmitt’s ‘categories would make it impossible to remove such a regime [the emergency presidential regime] once in place by appeals to “normalcy”.’

⁴⁷⁸ Kam Shapiro *Carl Schmitt and the Intensification of Politics* (Lanham: Rowman & Littlefield Publishers Inc, 2008), 53: ‘When confronted with the obvious objection that the executive, unlike parliament or the judiciary, was not empowered to create law, but only issue decrees or measures, Schmitt essentially reverses the charges’.

losing its former character and becoming a mere measure'.⁴⁷⁹ It is within this fragmented reality, characterised by its purported fusion of executive and legislative roles, that Schmitt devastatingly unleashes 'his' extraordinary lawmaker against those legal-constitutional devices misguidedly designed for the delimitation of executive discretion. To Schmitt, confidence in the certainty and predictability of the legislatively-enacted legal norm is tenable only within a condition of normalcy, attended by its array of embedded social, economic and cultural parameters.⁴⁸⁰ Once the established legal order unravels, an infinitely more responsive and vibrant regime must intervene:

'With its organisational separation of law and legal application, the parliamentary legislative state forms all its protective institutions that are linked to and distinctive of the *Rechtsstaat* with a view to defending against the executive. But for the extraordinary lawgiver of Article 48, the distinction between statute and statutory application, legislature and executive is neither legally nor factually an obstacle. The extraordinary lawmaker combines both in his person. [He] is free to intervene in the entire system of existing statutory norms and use it for his own purposes. He unites in himself lawmaking and legal execution and can enforce directly the norms he establishes, which the ordinary legislature of the parliamentary legislative state cannot do, as long as it respects the separation of powers, with its distinction between law and legal application so essential for the legislative state.'⁴⁸¹

This unambiguous repudiation of the separation of powers doctrine appears to signify the death knell of the legal constitutional state. Without adequate normative or procedural control over the law-making process, the 'rule of law' enshrined at the heart of the *Rechtsstaat* lies in tatters. Additionally, because the president is unfettered by the need to issue a 'general' norm, '*a dictator can issue an individual order immediately and directly*'.⁴⁸² Irrespective of their *ad hoc* and peremptory nature, decrees seamlessly acquire the force of 'law'. Not only does this have crushing impact for the intended human objects of such ordinances. But also the opportunity it presents of singularising a specific person or group, on a potentially arbitrary and impromptu basis, appears palpably incompatible with the notion of a comprehensive embargo upon retrospectively-deployed criminal law.

⁴⁷⁹ *Supra*: Schmitt *Legality and Legitimacy*, 83.

⁴⁸⁰ *Supra*: Shapiro *Carl Schmitt and the Intensification of Politics*, 51; see Chapter 5 for the impact upon the retrospectivity debate of Schmitt's telling devaluation within the domestic context of the concepts of certainty and predictability within law-making and application. Whether this is empirically true is more problematic.

⁴⁸¹ *Supra*: Schmitt *Legality and Legitimacy*, 71.

⁴⁸² *Ibid*: 70.

Here then the culmination and potential ramifications of Schmitt's incremental transition from commissarial to sovereign dictatorship. His vaunted motivation: the preservation of the faltering Republic. However, to what extent does his increasingly authoritarian stance contribute to this asserted objective?⁴⁸³ Schwab argues that had Hindenburg acted more decisively in accordance with the sovereign-like powers Schmitt ultimately insists reside within Article 48, the Nazi route to their own version of 'sovereign dictatorship' could have been averted.⁴⁸⁴ This remains moot, for according to Mc Cormick:

'In neither Guardian of the Constitution or Legality and Legitimacy, does Schmitt acknowledge the limitations of his own position or conscientiously consider alternatives to his own institutional solution; presidential government which tended to collapse the system of separation of powers and provided few tangible limitations on executive action.'⁴⁸⁵

That Schmitt hijacks the concept of dictatorship to accentuate presidential authority under Article 48 is clear. But awash with potential for expedient application, the deceptive simplicity of Article 48 also belies the sophistication of Schmitt's fully-considered conceptualisation of 'sovereignty' and the 'state of exception'.⁴⁸⁶ Valorisation of dictatorial power, as instrumentalised through the *Reichspräsident* is, for Schmitt, entwined with his account of the exception and its correlation both with sovereignty and the decision it produces.⁴⁸⁷ In coalescence with his conceptualisation of dictatorship, all seem similarly antithetical to a *Rechtsstaat* state model. It is, therefore, with examination of these new-found threads in the Schmittian skein that the journey continues.

⁴⁸³ *Supra*: Wolin 'Carl Schmitt, political existentialism and the total state', 389-416: 'A revisionist groundswell suggests that Schmitt wished to enhance presidential powers under Article 48, to strengthen or save the fragile republic rather than hastening its demise'.

⁴⁸⁴ *Supra*: Schwab *The Challenge of the Exception*, 59

⁴⁸⁵ *Supra*: Seitzer *Introduction to Constitutional Theory*, 26; Schmitt's treatment in his *Legality and Legitimacy* of the principle of equal chance and the extent to which it impeded and, indeed, accelerated the downfall of the Weimar Republic, in face of Schmitt's exhortations to invoke a presidential dictatorship, is explored later in this Chapter.

⁴⁸⁶ Schmitt's treatment of the state of exception in the wider context of the issue of sovereignty is dealt with below.

⁴⁸⁷ See *supra*: Scheuerman *The End of Law*, 31: Scheuerman points to Schmitt's identification of the 'problem of dictatorship with the problem of the concrete exception within legal theory'. Drawing upon *Die Diktatur*, Scheuerman relies upon Schmitt's assertion that: 'The omnipresent possibility of a gap between legal norms and the manner in which they gain realisation in the concrete world is precisely where the essence of dictatorship lies'.

The exception, sovereignty and the decision: the ‘when’, the ‘who’ and the ‘how’

The ‘when’: the exception

What precipitates - but scarcely exhausts - this debate is the critical inquiry concerning the moment at which dictatorial authority purportedly arises. In the language of Article 48, how is it determined when ‘public safety and order in the German Reich are considerably disturbed or endangered’ and therefore the moment at which presidential discretion falls to be exercised? The Reich Constitution might purport to stipulate the category of person to whom the exercise of emergency powers is allocated; the precise mechanism by which the president is elected and the regulatory restraints inhibiting the disposition of his authority. But as Schmitt ruefully implies, the founders of the Republic erred when they sought to control the utilisation of dictatorial discretion in a situation where the very existence of the state is at stake. This is simply unrealistic. Schmitt’s professed concerns are of wider significance. What is the position when, unlike Article 48, the procedure for the existence and appointment of the ‘extraordinary lawmaker’ is not constitutionally or legally predetermined? Or when some tepid attempt at legal regulation is made but proves inadequate? How is the integrity of the state to be safeguarded in the face of imminent catastrophe? An egregious menace undeniably demands a commensurately efficacious response. This, for Schmitt, is the ‘state of exception’ that mandates a sovereign decision and it is in *Political Theology (PT)* where he chiefly chooses to expound his theoretical position.⁴⁸⁸ Nor is this a merely hypothetical construct given that the ‘exception’ within the turmoil of Weimar Germany ‘is closer to being the norm’.⁴⁸⁹

Unlike Hobbes, to whom the Commonwealth is effectively a permanent state of exception, overseen by an authoritarian sovereign entity, Schmitt views the exception as a hovering, extra-legal rupture in the wished-for ordered state of civil society. Ever to be feared, yet seemingly inevitable and even indispensable. In essence, the ostensibly ‘normal’ condition of relative tranquillity is only capable of discernment and

⁴⁸⁸ See *supra* Schmitt *Political Romanticism*, where Schmitt vilifies what he terms: ‘romantic occasionalism’. Schmitt’s conceptualisation of the exception is arguably an example of the occasionalism that Schmitt evidently despises.

⁴⁸⁹ *Supra*: Hirst ‘Carl Schmitt’s Decisionism’, 15-27: ‘Schmitt highlights that all legal orders have an ‘outside’ and that agencies within the state have an option, if not a formal constitutional right to act extra-legally’. Hirst equates the situation in Weimar Germany to the prospect of a perpetual state of exception in the technological nuclear age.

comprehension through the vehicle of a state of exception, both legally indefinable and existentially imminent:

‘For Schmitt, the crisis is more interesting than the rule because it confirms not only the rule but its existence which derives only from the exception.’⁴⁹⁰

This assessment supposedly validates Schmitt’s claim that ‘*in the exception, the power of real life breaks through the crust of a mechanism that has become torpid by repetition*’.⁴⁹¹ The exception, with its asserted existential - though non-normative - transcendence, explodes the positive law-oriented normalcy of bourgeois liberal society and crucially permits concrete facticity to emerge with pulsating vibrancy.⁴⁹² As ‘*all significant concepts of the modern theory of the state are secularised theological concepts*’,⁴⁹³ Schmitt views ‘*the exception in jurisprudence [as] analogous to the miracle in theology*’.⁴⁹⁴ Just as the miracle implemented by God intrudes upon the laws which prevail in the state of nature, the exception is likewise a fracture in the technical perfection of the legal-constitutional state:

‘Transcendence and miracle in relation to state powers are metaphors that reintroduce and address emergency. Schmitt wished to revalorise the extralegal intervention of the sovereign power, which is a metaphor for God’s intervention on earth, freed from the constraints of the laws of nature.’⁴⁹⁵

⁴⁹⁰ George Schwab *Introduction to Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Massachusetts: MIT Press, 1985) trans. George Schwab from *Politische Theologie*, 1922 (Berlin: Duncker & Humblot, 1934), xv; *supra*: Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*, 15.

⁴⁹¹ *Ibid*: Schmitt, 15.

⁴⁹² *Supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424-447.

⁴⁹³ See *supra*: Holmes *The Anatomy of Antiliberalism*, 47: according to Holmes, ‘Schmitt goes off the rails when he asserts that the modern concept of sovereignty is a secularised version of the theological idea of divine authority.’ This is because he distorts his primary sources, primarily Bodin. Contrary to Schmitt’s reading, Bodin explicitly stated that the sovereign should rule by and via general law. Bodin thought that the political decision to declare an emergency situation was precipitated only by exceptional events and should be kept within the political arena. The analogy that captures Schmitt’s imagination is therefore, in Holmes’ view a false analogy.

⁴⁹⁴ *Supra*: Schmitt *Political Theology*, 36; see *supra*: Baume ‘On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt’, 369-381: ‘According to Bockenforde, Schmitt had a juridical conception which presupposed the analogical transposition of theological concepts onto the state and juridical spheres’.

⁴⁹⁵ *Supra*: Baume ‘On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt’, 369-381.

In contrast, the Age of Enlightenment excludes theism and all transcendental conceptions in favour of the advent of deism and a rationalistic mode of thought.⁴⁹⁶ Concomitant with this development is the absorption of the sovereign within the legal system and the repudiation of the personalistic sovereign. As the sovereign, within the newly-conceived deistic worldview, is '*pushed aside*', a lamentable situation ensues where '*the machine now runs itself*'.⁴⁹⁷ To Schmitt's chagrin, this relegation or subsumption of the sovereign is embraced by legal and political positivist philosophers of renown, including Kelsen, with their '*relativistic and impersonal scientism*'.⁴⁹⁸ For them, the exception does not exist.⁴⁹⁹ The entire constitutional system is capable of encapsulation within predetermined, ordained legal norms. Decisions are permissible only when integral to the implementation of the norms by which the regime is regulated. Emergencies that threaten the security of the state are governed by these stipulated legal rules and nothing else. No scope for additional measures exists.

In turn, Schmitt unsurprisingly derides what he perceives as this fatal naivety on the part of liberal-positivists.⁵⁰⁰ The constitution to which they subscribe can provide only limited guidance: its sole virtue lies within its capacity to indicate *who* shall act in any given situation. But is this adequate? If positivists place their trust wholly in a system of predetermined norms then, by the logic to which *they* subscribe, the constitution should contain no lacunae. It should deal with every contingency which might confront the state it purports to regulate. This, to Schmitt is nonsensical.⁵⁰¹ On what credible basis is it ever feasible to cater in advance for every concrete exigency? Why will positivists not

⁴⁹⁶ *Supra*: Schmitt *Political Theology*, 49; see also *supra*: Stephen Holmes *The Anatomy of Antiliberalism* (Cambridge, Massachusetts and London: Harvard University Press, 1996), 46: 'Especially memorable is Schmitt's claim that 19th century theories of the "nightwatchman" state would have been unthinkable without a prior theological revolution that replaced an interventionist God with a clockmaker God'.

⁴⁹⁷ *Ibid*: Schmitt, 48.

⁴⁹⁸ *Ibid*: 49.

⁴⁹⁹ *Supra*: Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', 369-381: 'The doctrines of the rule of law, in particular Hans Kelsen's doctrine, were primarily defined by Schmitt through their refusal of the intervention of the sovereign power in the legal order and by the rejection of personal authority'.

⁵⁰⁰ See *supra*: Schmitt *On the Three Types of Juristic Thought*, 52 where Schmitt employs the analogy of the transition from a traffic policeman to automated traffic signals to convey his derision for the purported transformation of legitimacy into his conception of value-neutral positivist legality.

⁵⁰¹ *Ibid*: 'Normativity and facticity are completely different planes....the matter of factness and objectivity of pure normativism leads to an order-dissolving juristic absurdity.'

concede that *'the exception cannot be circumscribed factually and made to conform to a preformed law'*?⁵⁰²

Schmitt deems it axiomatic that 'the exception' transcends control by pre-established norms.⁵⁰³ It is a real-life concept that meshes with and derives its force from the prevailing concrete circumstances, not a set of arid legal rules.⁵⁰⁴ Because a general norm requires contextualisation within an *'everyday frame of life to which it can be factually applied'*, it follows that *'there exists no norm that is applicable to chaos'*.⁵⁰⁵ Norms are adequate only when disorder is successfully eradicated but have neither utility nor relevance when confronted with a condition of extreme peril.⁵⁰⁶ *'The nightmare of a never-ending quest for ultimate normativity'* is the ineluctable by-product of supersession of *'a meta-level self-sufficiency of a God-like natural law to provide positive law its groundless ground'*.⁵⁰⁷ Whatever natural law justification once existed for the formulation and content of positive law has slipped away and, for Schmitt, the relativisation of the norm consequent upon it is untenable. Imperative,

⁵⁰² *Supra*: Schmitt *Political Theology*, 6; see Jan-Werner Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 186. Here, Muller refers to Bockenforde's reworking of Schmitt's state of exception: 'Bockenforde stressed the political dimension of the state of exception and the fact that any attempt to regulate it would be more likely to lead to illiberal results than a clearly determined separation between law and measures. Paradoxically, for Bockenforde, liberals should not make room within the law for the state of exception. Instead they should recognise the potentially 'illiberal' exercise of emergency powers and make it subject to extensive review by institutions specifically designed for such review. Problems of politics had to be solved politically, rather than being addressed via a juridification of politics'; *supra*: Holmes *The Anatomy of Antiliberalism* (Cambridge, Massachusetts and London: Harvard University Press, 1996), 88, 'Schmitt did not pay sufficient heed to Lockean and others' recognition of the exceptional situation. Liberal constitutions do not abolish executive power and executive power does not always operate within pre-established rules. Liberals never conceived the 'rule of law' as the sovereignty of abstract, self-applying rules. They viewed it instead as rule by elected and accountable officials in accordance with publicly promulgated and revisable laws'.

⁵⁰³ *Supra*: Wolin 'Carl Schmitt, political existentialism and the total state', 389-416: 'Liberals sacrificed the sublime values of transcendence in favour of prosaic values of immanence'.

⁵⁰⁴ According to Baume, Schmitt's doctrine 'not only asserted that law and state are two distinct entities but also that the state *transcends* law. Thanks to its emergency powers, the Schmittian state is equipped to emancipate itself from the juridical order. Sovereignty is thus defined or expressed as separate from ordinary legality': *supra*: Sandrine Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', 369-381.

⁵⁰⁵ *Supra*: Schmitt *Political Theology*, 13; on this point see William Rasch *Sovereignty and its Discontents* (London: Birkbeck Law Press, 2004), 23: 'Since norms are neither divinely revealed nor rationally reconstructed, they must be determined by their context'

⁵⁰⁶ See *supra*: Dyzenhaus *Legality and Legitimacy*, 46. Here, Dyzenhaus posits that: 'while the vitality of the exception looms large as the theme of *Political Theology* it is important to keep in mind that Schmitt was not arguing for the total negation of normality'. This is, perhaps, correct though Schmitt's exposition of sovereignty appears nonetheless to accord to the sovereign entity virtual *carte blanche* to treat the legal-constitutional system as he pleases; see also *supra*: Wolin 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', 424-447: 'From Schmitt's insight that the norm is destroyed in the exception and from the ashes of the norm, an ontologically higher condition of political life will emerge'.

⁵⁰⁷ *Supra*: Rasch *Sovereignty and its Discontents*, 26-27.

therefore, is the quest to *'break open Kelsen's normative system by including the exception within it'*.⁵⁰⁸

'Against the formalistic, universal, general and abstract qualities of legal positivism, and the rule of law, which aspires to replace the central authority and the rule of men with the impersonal function of a set of procedural mechanisms and legal determinations to impose effective limits on political power, Schmitt sought to re-define sovereignty as the contingent, unpredictable, subjective moment of the concrete manifestation of an undetermined will, which in the form of a decision, and like a miracle, is able to overstep the legal and institutional limits.'⁵⁰⁹

⁵⁰⁸ *Supra*: Schwab *The Challenge of the Exception*, 46.

⁵⁰⁹ Andreas Kalyvas 'Democracy and the Politics of the Extraordinary Max Weber, Carl Schmitt and Hannah Arendt', *Journal of Political Ideologies*, Vol. 5 (3), (2000), 343-376.

The 'who': sovereignty

The mechanism for both *recognition* of the exception and appropriate *action* in the face of it, are as crucial as the initial *realisation* that an 'exception' to the normal legal order may exist. Here arises the dialectic between the exception and sovereignty for '*it is precisely the exception that makes relevant the subject of sovereignty*'.⁵¹⁰ Susceptible neither to moral nor normative conceptualisation, the sole determinant of sovereignty is existential.⁵¹¹ This is because '*in political reality, there is no irresistible highest or greatest power that operates according to the certainty of natural law*'.⁵¹² For Schmitt, '*sovereign is he who declares the exception*'⁵¹³ though the precise meaning of this assertion is, as yet, shrouded in ambiguity. Whether it is that he who makes the decision upon the exception is, in fact, sovereign or that a decision is valid, only when made by the sovereign is never, at this stage, clarified.⁵¹⁴ The vital distinction between *de facto* and *de jure* authority is not explicitly addressed.⁵¹⁵

What is apparent, however, is that the sovereign '*decides whether there is an extreme emergency as well as what must be done to eliminate it*'.⁵¹⁶ Standing outside the legal system whilst simultaneously part of it, it is the sovereign who '*must decide whether the constitution needs to be suspended in its entirety*'.⁵¹⁷ Whether the origin of sovereign power is 'autonomous', that is, '*performative*'⁵¹⁸ (constitutive) or 'derived' (constituted), is directly affiliated to Schmitt's ambivalence towards his concept of dictatorship. If sovereign, authority appears synonymous with the sheer brute force of such entity as wields it; if commissarial, such authority must instead be delegated to a

⁵¹⁰ *Supra*: Schmitt *Political Theology*, 6.

⁵¹¹ See *supra*: Rasch *Sovereignty and its Discontents*, 24-28: According to Rasch, Schmitt repudiates any attempt to define sovereignty in terms of legality; Schmitt demands that a distinction be drawn between 'actual power' as he conceives it and the 'legally highest power', recognised by legal positivism. Only the former, in its raw facticity, constitutes genuine 'sovereignty'.

⁵¹² *Supra*: Schmitt *Political Theology*, 17.

⁵¹³ *Ibid*: 5.

⁵¹⁴ *Supra*: Dyzenhaus *Legality and Legitimacy*, 42.

⁵¹⁵ This is not a critique confined to Schmitt; on this point see, for example, Stanley L. Paulson 'Classical Legal Positivism at Nuremberg' *Philosophy and Public Affairs*, Vol. 4, No. 2 (Winter, 1975), 132-158: 'In speaking of classical legal positivism, I have in mind the philosophical theory developed from Austin's two doctrines. The theory has been widely – and correctly – criticised for failing to...distinguish between *de facto* and *de jure* sovereignty'.

⁵¹⁶ *Supra*: Schmitt *Political Theology*, 7.

⁵¹⁷ *Ibid*; see also Michael Salter 'Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's Critical Theory of Law' *Res Publica* Vol.5 (1999), 161-194: 'In the state of emergency, all previously sanctioned legal and constitutional rights are suspended. Schmitt accords absolute priority to the exception'.

⁵¹⁸ *Supra*: Rasch *Sovereignty and its Discontents*, 24: 'One can say that that articulation of a concrete norm is not the result of a derivation but the effect of a performative'.

situation-specific, temporally constrained ‘decision-maker’. During more moderate phases within his theoretical evolution, Schmitt depicts the legitimacy of ‘sovereign’ action as derivative, not originary. Licence to violate legal-constitutional norms does not spontaneously arise:

‘When in the interest of political existence, statutory violations and measures are used the superiority of the existential element over the merely normative one reveals itself. Whoever is authorised to take such actions and is capable of so doing, acts in a sovereign manner.’⁵¹⁹

Echoing what was foreshadowed in *PT* where - for reasons of causality - he repudiated Jean Bodin’s classical definition of ‘*the sovereign [as] the highest legally underived power*,⁵²⁰ it is only with the advent of the Nazi era that Schmitt reaffirms the correlation within his earlier decisionism between the legitimacy of the sovereign decision and *any* entity with the *de facto* wherewithal to enforce order:

‘The sovereign is not a legitimate monarch or established authority but merely the one who decides in a sovereign manner. Whoever establishes peace, security and order is sovereign and has all the authority.’⁵²¹

Just as Hobbes lauded the personalised sovereign, so too does the decisionist Schmitt.⁵²² In contrast, positivists such as Kelsen, allegedly ‘*solve the problem of sovereignty by*

⁵¹⁹ *Supra*: Schmitt *Constitutional Theory*, 154 (author’s italics and underlining). The use of the passive tense here makes it clear that the person or institution that carries out ‘sovereign’ tasks during the exception is a constituted and not a constitutive authority (presumably commissarial rather than sovereign in a Hobbesian sense).

⁵²⁰ *Supra*: Carl Schmitt, *Political Theology*, 17. A similar stance was also adopted in *Legality and Legitimacy* (1932). See also *supra*: Rasch *Sovereignty and its Discontents*, 28, who highlights that the positivistic insistence on raising legality to the level of sovereignty fails to acknowledge the crucial and empirical distinction between “actual power” and “the legally highest power”. What Schmitt rejects is the concept of ‘the highest legal power’, as distinct from the notion of ‘actual power’. It is this latter conceptualisation of sovereignty only that satisfies the decisionist Schmitt of *Political Theology*. It is erroneous in Schmitt’s view to allow the question of sovereignty to be defined as a ‘problem of judgment. ‘The rule of law ignores this problem by identifying all judgement with determinate judgment, assuming as it were that all decisions became superfluous because logical judgments simply “make themselves”.’

⁵²¹ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 61. This is Schmitt’s afterword on sovereignty and decisionism, in 1934, at a time when he had seemingly renounced decisionism in favour of concrete-order thinking. Perhaps, at this point, he is prepared to be more candid about an earlier but, now, ostensibly jettisoned theoretical position. It is interesting that in his 1934 advocacy of concrete-order thinking, he chooses to contrast its merits with the most extreme version of his 1920s and early 1930s decisionist position, as articulated in *Political Theology*.

⁵²² Controversially, perhaps, Kennedy posits that whereas Hobbes locates sovereign power in a person or institution authorised to give law, Schmitt transforms the Hobbesian notion of the sovereign as a person or instance, into a moment of existential intervention in a process over which the state does not prevail. She therefore re-interprets the pivotal role Schmitt appears to accord the personalised sovereign within the legal order: Ellen Kennedy ‘Carl Schmitt and the Frankfurt School’ *TELOS* No. 71, (Spring 1987), 37-66 and Ellen Kennedy ‘Carl Schmitt and the Frankfurt School: A rejoinder’ *TELOS* No. 73 (Fall 1987), 1-116.

negating it'.⁵²³ This, for Schmitt, is problematic since from the positivistic claim of 'a logically consistent and complete Rechtsstaat', where 'all norms are ineluctably relativised'⁵²⁴ and law itself is sovereign, 'concealments and fictions inevitably emerge'.⁵²⁵ How does any system aspire to coherency and legitimacy when it strives entirely to circumvent the question of sovereignty and instead 'leaves open the question of which political will makes the appropriate norm into a positive legal command'?⁵²⁶

⁵²³ *Supra*: Schmitt *Political Theology*, 21 in which Schmitt remarks upon the similarity of Kelsen to Hugo Krabbe, 'whose theory of the sovereignty of law rests on the thesis that it is not the state but law that is sovereign'.

⁵²⁴ *Supra*: Rasch *Sovereignty and its Discontents*, 27.

⁵²⁵ *Supra*: Schmitt *Constitutional Theory*, 187.

⁵²⁶ See *ibid*; see *supra*: Shapiro *Carl Schmitt and the Intensification of Politics*, 5: 'Legal norms, Schmitt emphasized, rested on a corresponding social order – a "normal situation" – and so ultimately depended upon judicial or political decisions regarding when to adopt them in the first place, to determine the proper circumstances of their application or ultimately to suspend them in the face of a more general threat to order as such'.

The 'how': the decision

For Schmitt, the key to resolution of these and other inquiries rests upon a sovereign 'decision'.⁵²⁷ Immanent within every legal order are both norm and decision and, crucially, it is in the exception - not the state of normalcy - that the significance of this decision emerges.⁵²⁸

'Unlike the normal situation when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception. The exception is that which cannot be subsumed; it reveals the decision in absolute purity.'⁵²⁹

Because valid universal legal norms do not exist, all law is necessarily 'situational'. This renders law effectual only to the extent it addresses each concrete emergency. Out of chaos, it is the task of the sovereign to produce and guarantee stability.⁵³⁰ A decision must be made in and for the moment. The sovereign has the sole right, not to coerce or to rule but to decide. Distinguishable from the Hobbesian monopoly of authority, it is this monopoly of decision that creates a vital empirical superiority over positive legal norms.⁵³¹ Because of the extreme peril posed by the state of exception, it is within this exigent condition that the need for a sovereign decision emerges with crystal clarity.⁵³² Indeed, '*the decision parts from the legal norm (in the exception) and authority proves that to produce law, it need not be based on law*'.⁵³³ But what then is to prevent a sovereign decision for a *permanent* state of exception over which an unconstrained and non-legally regulated dictator holds sway through the exercise of unbridled power?⁵³⁴ If

⁵²⁷ On this point, see *supra*: Schmitt *The Crisis of Parliamentary Democracy*, 44: 'The usual definition of sovereignty today rests on Bodin's recognition that it will always be necessary to make exceptions to the general rule in concrete circumstances and that the sovereign is whoever decides what constitutes an exception' (though it is important to note that Schmitt does not always accurately represent the views of those whose theories he appropriates or utilises).

⁵²⁸ *Supra*: Schmitt *Political Theology*, 10.

⁵²⁹ *Ibid*: 12.

⁵³⁰ *Ibid*: 14; *supra*: Scheuerman *The End of Law*, 116: 'Schmitt offers an empirical chronicle of the decline of the liberal vision of a neatly codified system of cogent, general norms capable of providing real guidance to legal decision makers.'

⁵³¹ John Samples 'Review of The Crisis of Parliamentary Democracy' *TELOS* No. 72, (Summer 1987), 205-214: 'It is not possible to circumscribe the state of exception and the sovereign's response since the situation and its solution cannot be determined with sufficient clarity.'

⁵³² *Supra*: Scheuerman *Between the Norm and the Exception*, 272, n.17: 'we should recall Schmitt's definition of sovereignty in terms of power decisions undertaken during the normless exception'.

⁵³³ *Supra*: Schmitt *Political Theology*, 14; see *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 23: 'Schmitt sought to found an authoritarian unified state out of a normatively groundless decision with undivided sovereignty. He injected Kelsen's pure theory of law with the brute facts of sociology and power. He affirmed decisionism, namely the notion that it matters not how and which decisions are made but that they are made at all. The state does not have to be right to create right'.

⁵³⁴ See *supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 75 where he posits that the exception is an example of the romantic occasionalism so criticised by Schmitt in

‘every power is transcendent [and] every transcendence is power’,⁵³⁵ where are the checks and balances upon executive action when the vestigial legal order, struggling to survive within the state of exception, comprises nothing other than measures the dictator summarily ordains and changes on a whim? If any normatively unregulated decree is able to attain the pseudo-status of ‘law’ merely by a wave of the dictator’s hand, the entire regime is reduced to little more than the ephemeral intangibility of a conjuror’s trick.

Some incipient degree of unease must, therefore, surely arise from Schmitt’s theoretical conceptualisation and empirical deployment of dual categories: a state of normalcy where he appears to concede the utility and validity of legal-constitutional norms, in counterpoise with a state of exception where norms are summarily swept aside by a legally ungrounded executive decision:⁵³⁶

‘The whole theory of the rule of law rests on the contrast between law which is universally binding without exception, general and already promulgated and a personal order which varies from case to case according to particular concrete circumstances.’⁵³⁷

Without more, the negation of the legal norm *within the exception* has ominous enough implications. Here, extemporised executive decision-making is immunised from any form of normative control. Similarly, Schmitt purports to shroud this sovereign decision within a power-clad sanctuary, invulnerable to ‘any rational challenge that employs specifically ethical or moral criteria of judgment’.⁵³⁸ Equally disquieting, however, is the lack of any pre-ordained extrinsic criteria upon which to adjudge the elemental danger that must exist *before* the sovereign is able to declare a state of exception.⁵³⁹

Political Romanticism: ‘In his promotion of the exception as a central category of political theory; a miracle-like wrench to be thrown into the works of the anti-positivist machine, that description could be an apt description of Schmitt himself’.

⁵³⁵ Carl Schmitt *Glossarium* (19.7.1948), *Aufzeichnungen der Jahre* (Berlin: Duncker & Humblot. 1991), 180.

⁵³⁶ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 172: ‘In Kelsenian terms, Schmitt posited two basic norms in his theory. One presumed the validity of presidential emergency acts as higher acts of state in abnormal times; the other presumed the validity of the written constitution in normal times. Schmitt thus advocated presidential absolutism. He effectively argued that ‘positive’ legal norms should be shaped or ignored in accord with political expedience’.

⁵³⁷ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 42.

⁵³⁸ *Supra*: Salter ‘Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt’s defence at Nuremberg from the perspective of Franz Neumann’s Critical Theory of Law’, 161-194.

⁵³⁹ *Supra*: Wolin ‘Carl Schmitt, political existentialism and the total state’, 389-416: ‘Schmitt shows an agnostic refusal to specify any substantive ends for decisionistic politics’.

Once again, this is a decision that emanates from nothing but raw power, mobilised to devastating effect within a normative void:

‘Schmitt’s complete relativisation of law to power (and to the contingencies of the particular situation of power) leads to the irrational deification of power and decision.’⁵⁴⁰

Leaving aside the previously posed question of ‘*who* is sovereign’, at least two further fundamental problems, therefore, arise from the wielding of sovereign authority in the specific context of the exception: arbitrary decision-making both within it and as a prelude to its inception. Tangential to the former is the exact duration of the state of exception, the absence of objectively-established and promulgated criteria for its cessation and the content of its governing rules. Hypothetically, this first - decision making within the exception - is analogous to a game in which the participants start to play in accordance with a pre-ordained rubric but are nonetheless armed with the knowledge that the regulatory framework is susceptible to radical amendment or eradication. The protagonists are aware from the outset that the referee has discretion, during the game, to alter, suspend or eliminate all or any of the rules in whatever manner he ordains. Without warning, what at one moment is in conformity to the existing rules becomes a violation of them.

Only one residual safeguard inures to the players. The referee discloses to them in advance the precise circumstances; the exact sequence of internal transgressions or external circumstances that will activate his licence to intervene in the rules of the game.⁵⁴¹ Insofar as concerns the vagaries of extrinsic events, the players naturally possess no control whatsoever. Provided, however, they avoid the commission of acts within their aegis and, in respect of which they have been forewarned, the onset of the arbiter’s discretion to disturb the existing rules is deferred. But having once infringed the forewarned criteria, the players must then surrender all hope of certainty or predictability. For in this neo-reality, the referee possesses absolute authority to introduce new rules of whatever character, content and quantity he deems appropriate. Further, once instigated, no certitude governs their longevity or revocation. Nothing fetters the discretion of the arbiter. His subjective will reigns supreme.

⁵⁴⁰ David Dyzenhaus ‘Introduction to Hermann Heller’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 253.

⁵⁴¹ Notably, within Schmitt’s conceptualisation of the state of exception, no such ‘luxury’ is accorded to state citizens.

In the second - decision-making as a prelude to the onset of the exception - the players enter the game on a different premise. On this occasion, the referee is empowered to suspend the existing rules on the occurrence of a configuration of events, known only to him. In such event, he possesses the discretionary latitude to instigate an entirely new regimen. Just one degree of protection is accorded the protagonists to the extent that, in advance of the game, a detailed account of the successor system is announced to them.⁵⁴² At no stage, however, are the players made privy to the specific nature of the triggering internal transgression or external rupture. All that is known is that at some undisclosed point during the game, the old rules may become suddenly defunct. On the contrary, it is feasible that the entire game might remain undisturbed. For ever in trepidation, however, that their actions – or worse still, extrinsic upheavals entirely beyond their control – are able to generate the abrogation of their familiar regime, the players' confidence in the integrity of the system diminishes to vanishing point.

But what happens on conflation of these two contingencies? The moment of decision, at which the rules of the game are changed, now lies exclusively within the secret, subjectively-formulated vagaries of the arbiter's will. Further, once this momentous step occurs, no novel but pre-disclosed system exists that the referee is bound to install in substitution for the old. Instead, the arbiter exercises absolute discretion upon all rules he chooses to inaugurate. Similarly, he has untrammelled authority as to the duration of the replacement system and the precise circumstances, if any, in which he can elect to restore the previous rules, in whole or part. What personal security do the players enjoy within a game where the existing rules have no stability; where they are dispensable on a whim and in which no externally verifiable parameters exist for the formulation of new ones? Nor even do they have the residual assurance that the prior regime will be, at some time, reinstated. Surely the sole 'guarantee' this affords the participants is the highest degree of anxiety, both chronic and unalloyed. Whether or not this is Schmitt's intention, it is arguably true.⁵⁴³

⁵⁴² At no stage does Schmitt give any indication of the exact workings of the legal order following the decision upon the exception. This is, therefore, an entirely conjectured paradigm.

⁵⁴³ This is a theme taken up *infra* in the discussion focussing upon Schmitt's conceptualisation of 'the political'. On this point see Carl Schmitt *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) translated by George Schwab from *Der Begriff des Politischen*, 1932 edition (Berlin: Duncker & Humblot, 1932).

However, there is more. Just as sovereign decisions to safeguard the state are purportedly vital in times of crisis, the primacy of the decision truly attains its apogee in the founding of the legal order itself,⁵⁴⁴ for *'like every order, the legal order rests on a decision, not a norm'*.⁵⁴⁵ Because the decision rests on the application of sovereignty to a concrete situation - what Schmitt categorises as *'the juristically concrete'* - this supposedly surmounts *'the a priori emptiness of the transcendental form'* (presumably natural law).⁵⁴⁶ It also avoids the dubious validity encountered in the attribution of the legal order to the spurious *'unity of a system of norms'*⁵⁴⁷ with the *'state as the terminal point of ascription'*⁵⁴⁸ at the pinnacle of a normative hierarchy:

'A diverse range of fictions must be set up, such as there is no sovereign at all or, what is the same thing, the constitution or rather constitutional norms, are sovereign. In reality, however, it is precisely the essential political decisions which elude normative definition.'⁵⁴⁹

To Schmitt, a state synonymous with the legal order itself - with the uniform basic norm - possesses a merely specious legality. Legitimacy is attainable only through the voluntarism of the existential decision, not the vaunted objectivity of the norm. Kelsen is, therefore, wholly misguided in his insistence upon *'championing the objectively valid norm over the subjectivism of command'*.⁵⁵⁰ The propensity of legal positivists to perceive the *'constitutive specific element of a decision, from the perspective of the underlying norm, as new and alien'*⁵⁵¹ illustrates their disastrous detachment from the concrete reality.⁵⁵² How normatively speaking, may the decision be deemed to emanate

⁵⁴⁴ This pre-supposes that Schmitt recognises the existence of two separate categories here: the decision upon the founding of an entire legal order *ab initio* as distinct from the decision upon the exception within a subsisting juristic order.

⁵⁴⁵ *Supra*: Schmitt, *Political Theology*, 11; also *supra*: Samples 'Review of The Crisis of Parliamentary Democracy' *TELOS* No. 72, (Summer 1987), 205-214: 'Sovereignty ends the confusion by determining what constitutes public order and his decision provides the foundation for the legal order most people take for granted. In *Political Theology*, Schmitt highlights the distinction between decisionism and neo-Kantians like Kelsen who claim that norms determine decisions.'

⁵⁴⁶ *Supra*: Schmitt *Political Theology*, 34.

⁵⁴⁷ *Ibid*: 15.

⁵⁴⁸ *Ibid*.

⁵⁴⁹ *Supra*: Schmitt *Constitutional Theory*, 154.

⁵⁵⁰ *Supra*: Schmitt *Political Theology*, 29: 'The objectivity that Kelsen claimed for himself amounted to nothing more than avoiding everything personalistic and tracing the legal order back to the impersonal validity of an impersonal norm'.

⁵⁵¹ *Ibid*: 31.

⁵⁵² Paul Gottfried *Thinkers of Our Time: Carl Schmitt* (London: The Claridge Press, 1990): 'Schmitt the decisionist expressly rejected the normativism of Kelsen'; according to Holmes, Schmitt misrepresents the liberal perspective towards the emergency situation. See *supra*: Holmes *The Anatomy of Antiliberalism* (Cambridge, Massachusetts and London: Harvard University Press, 1996), 59: 'Liberal constitutions do not abolish executive power and executive power does not always operate within pre-established rule. Liberals never conceived the rule of law as the sovereignty of abstract self-applying rules. They viewed it instead as rule by elected and publicly accountable officials in accord with

'from nothingness',⁵⁵³ when its quintessential validity is so readily discernible within the panoply of factors besieging its inception? Reified by concrete circumstances, the point of legitimation for the decision is beyond dispute. Only the decision of a personalistic sovereign is capable of establishing an authentic legal order; the state itself.⁵⁵⁴ Hence, like Hobbes - at least on Schmitt's reading - 'authority', not 'truth' makes law for '*in decisionism, exists the immediately executable directive – a legal value in itself. In this world, one thing still holds true – the best thing in life is a command*'.⁵⁵⁵ Without recourse to mediation by pre-established legal norms, the pre-eminence of the decision lies in its capacity to reveal directly correct law, justice and reason.⁵⁵⁶ As *voluntas* prevails over *ratio*;⁵⁵⁷ will over norm, the positively-given norm becomes substantially superfluous in both the grounding of a 'legal order' and any condition that approximates to a threat to its continued existence.⁵⁵⁸

Though Schmitt may well elucidate '*a part of politics which many who enjoy the seeming security of the constitutional state would sooner forget*',⁵⁵⁹ does not his anti-normative fixation upon the exception; his compulsive pre-occupation with the unfettered sovereign decision plunge him headlong into the abyss of irrationality? For grope, as he may, for some form of *transcendent* validation located within the exigency of the moment, is this likely to produce any more than a dubiously *immanent* legitimacy? How are the vagaries of the ever-changing concrete reality supposed to provide a stable foundation for an entire legal order? Because of this exaggerated

promulgated and revisable laws. Personal responsibility for political decisions is more likely to be preserved in a liberal than a non-liberal political system'.

⁵⁵³ *Supra*: Schmitt *Political Theology*, 31.

⁵⁵⁴ See *supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 10: 'For Schmitt's critics(Schmitt's) critique was manifested in the decisionism which he opposed to normativism and the liberal abhorrence of leadership and authority; in his notion of sovereignty defined in opposition to the rule of law; in his concept of the political as the ability to distinguish between friends and enemies; and in his option for strong political leadership which he opposed to the ineffective parliamentarism of the Weimar republic and paved the way for the Fuhrer. These were the Mephistophelean ingredients used in his campaign against Weimar's parliamentary democracy'.

⁵⁵⁵ *Supra*: Schmitt *Legality and Legitimacy*, 9.

⁵⁵⁶ On this point, see *supra*: Schmitt *Legality and Legitimacy*, 5; Schmitt is strictly referring here to what he terms the 'jurisdiction state' rather than the 'administrative' state', though his emphasis upon the power of the decision to address the concrete situation is similar in each.

⁵⁵⁷ *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxxiv: 'The belief in will is more important than the belief in reason'; Michele Nicoletti 'Carl Schmitt *nella Stampa Periodica Italiana*' trans. Camilla R. Nielsen *TELOS* No. 72, (Summer) 1987, 217-225: 'Decisionism promotes executive power. There is a polarity between normativism and decisionism; between norm and decision'.

⁵⁵⁸ Nicoletti observes that outside the stable order of authority, the norm is completely empty and ineffective: *ibid*: Nicoletti, 217-225.

⁵⁵⁹ *Supra*: Samples 'Review of The Crisis of Parliamentary Democracy', 205-214.

emphasis upon the normatively ungrounded decision, Schmitt seemingly jettisons the capacity to differentiate between ideologies; hence the fateful vulnerability of his theoretical position.⁵⁶⁰ What is objectively good or bad; moral or immoral becomes wholly immaterial within a system indifferent to both. Transposed to the Nazi era, no yardstick exists against which to properly distinguish between ‘*a law and an SS memo*’:⁵⁶¹

‘Decisionism reduces legal authority regulated by the rule of law and basic rights to an essentially instrumental form of sovereign power. The latter is exercised in a moral vacuum in which the only criterion of success is success itself.’⁵⁶²

The arguably warped reality that Schmitt depicts seems to herald the sacrifice of certainty, predictability and fidelity in the creation, application and enforcement of *any* rule masquerading as a ‘legal norm’.⁵⁶³ In such event, what of the pre-established publicly promulgated general norm? Is the rule of law now obsolete? Does then his resultant arbitrary scheme represent nothing more than a mere parody of a ‘legal order’: utterly de-formalised, procedurally ravaged and morally bereft? Or again, is this simply a pragmatic recognition on Schmitt’s part that predicatability and certainty are rarely realisable within the vagaries of judicial discretion?

‘Law....addressed to this or that group of subjects revocable at will, cannot generate legal obligations not just because it is unpredictable but because inconsistent and reversible decisions addressed to a heterogeneous assortment of legal subjects cannot be rationally justified by an indivisible sovereign will’.⁵⁶⁴

Given Schmitt’s apparent naked disavowal, at this stage, of any type of normative basis for the legal order, what remains?⁵⁶⁵ Only it seems a starkly reductionist and irrationalist ‘*anti-normative orientation to law*’ that elevates the ‘*sheer existential*

⁵⁶⁰ See David Dyzenhaus ‘Now the machine Runs itself’ *Cardozo Law Review* (1994) Vol.16, (1994), 1-19.

⁵⁶¹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 200; a similar critique may be against Kelsen’s Pure Theory of Law in that, according to some critics, Kelsen ostensibly provides no basis upon which to adjudge between the validity of between regimes -amoral or otherwise.

⁵⁶² *Supra*: Salter ‘Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt’s defence at Nuremberg from the perspective of Franz Neumann’s Critical Theory of Law’, 161-194.

⁵⁶³ *Supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424-447: What Schmitt deems the ‘politics of authenticity’ (in the exception), Wolin labels the ‘aesthetics of horror’.

⁵⁶⁴ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 200. Incidentally Balakrishnan also doubts whether ‘law’ conceived (in positivistic terms), as a body of procedurally correct norms, is any more deserving of the status of valid ‘law’.

⁵⁶⁵ This reflects Schmitt’s position as it emerges from his Weimar productions but as Chapters 4 and 5 demonstrate, concrete order thinking and *nomos* are vital modifications to his Weimar-era stance.

decision' over any other consideration.⁵⁶⁶ What passes as a legal system now emerges as a pale and attenuated substitute for the legal-constitutional state it could have been. If the hazards consequential upon this development require empirical substantiation, then surely the Nazi regime provides it in abundance.⁵⁶⁷ For as the testament of history bears tragic witness, what Schmitt interprets as a hard-fought conquest over the sterility of value-neutral legality ultimately proves little more than a Pyrrhic victory.⁵⁶⁸

Schmitt claims to draw inspiration for the proper foundation of the 'legal order' from Hobbes' state theory but is this assertion disingenuous? Undeniably authoritarian Hobbes does, at least, strive to found his Commonwealth upon a democratic consensus impelled, at bare minimum, by reason.⁵⁶⁹ In contrast, the Schmitt of *PT* appears to dredge legitimacy from nothing other than the unadulterated power of the existential decision,⁵⁷⁰ a stance he retrospectively articulates during the 1930s: '*the sovereign decision is the absolute beginning and the beginning is nothing but sovereign decision*'.⁵⁷¹ Within Hobbes' pre-state condition, some conception of the Law of Nature prevails. But for the early-Weimar Schmitt, no pre-political rights precede the establishment of the legal order. The obligation of the state to protect and the countervailing duty of the individual citizen to obey represent what, for Schmitt, is the essence of constitutional governance. This is a fundamental reality, not an *a priori* right of protection accruing to the individual and endowed by traditional natural law precepts. For Hobbes, there is too much normativity within the state of nature; for Schmitt there

⁵⁶⁶ *Supra*: Salter 'Neo-Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's Critical Theory of Law', 161-194.

⁵⁶⁷ On this point see, however, *supra*: Seitzer *Introduction to Constitutional Theory*, 46, in which Seitzer correctly observes that the Nazi regime was predicated upon the primacy of the party. This notion of a factionalised entity with the prerogative of decision-making with the capacity to encroach upon state authority was anathema to Schmitt.

⁵⁶⁸ See *supra*: Kennedy *Introduction to The Crisis of Parliamentary*, xxxv in which Kennedy comments that, according to Schmitt, because legal positivism was politically neutral, a republican constitution could find 'temporary legality' but not 'permanent legitimacy'.

⁵⁶⁹ *Supra*: Scheuerman *Between the Norm and the Exception*, 294, n.7.

⁵⁷⁰ As the 1920s progress and he refines and redefines the concept of 'democracy' (which he perceives as symbiotic with, rather than antithetical to dictatorship) Schmitt increasingly seeks to ground the sovereign decision in 'the people'; on this point, see *inter alia supra*: Schmitt *Constitutional Theory*. This is discussed further below.

⁵⁷¹ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 61; in fairness to Schmitt, this was written more as a retrospective description of the principal facets of decisionism at a time when he was seemingly intent in discrediting the volatility of a decisionist state theory in favour of his move towards concrete-order thinking. Nonetheless, at various stages during the Weimar regime, this was the extreme view to which Schmitt patently subscribed.

is none.⁵⁷² It is this pivotal distinction that ultimately impels Schmitt to resort to a fundamental distortion of Hobbes' rationale for the underlying basis of the nation state.⁵⁷³

'Sovereign decision springs from a normative nothing and a concrete disorder. The state of nature is for Hobbes a condition of strife, deepest desperate disorder and insecurity, a ruthless and orderless struggle of all against all. With Hobbes, the logical structure of decisionism is most clear because pure decisionism presupposes a disorder that can only be brought into order by actually making a decision, not by how a decision is made.'⁵⁷⁴

This apparent misrepresentation is possible only because Hobbes is never explicit as to whether legitimacy of law is grounded in the purpose for which commands are issued or the very act by which they arise. By diverting focus to nothing save the establishment and preservation of order itself, Schmitt is able to exploit this yawning ambiguity within Hobbes' command theory.⁵⁷⁵ 'On this reading, the fundamental question for Hobbes is purportedly not "what" is decided but rather "who decides".'⁵⁷⁶ No longer is the underlying normative objective of a legal system of any import. The act of decision-making acquires uncontested primacy over its normative content:

'It is exceedingly difficult to prove that Schmitt deliberately misread Hobbes. Indeed he may simply have been wrong. Nonetheless the extraordinary one-sidedness of Schmitt's interpretation of Hobbes harmonises so well with his argument concerning the centrality of decision in constitutionalism then it suggests that it was a deliberate move on his part.'⁵⁷⁷

To Schmitt, there is nothing perverse in his - or, by analogy, Hobbes' - conceptualisation of a 'legal system'. Chaos may well abide in the non-state condition but cannot possibly survive the transition wrought by the sovereign decision that underpins it. The power of the decision eradicates all deleterious elements that potentially imperil the integrity of the sovereign state.⁵⁷⁸ Renunciation of mayhem in favour of a regime where order prevails epitomises all that is existentially logical. The

⁵⁷² See *supra*: Dyzenhaus *Legality and Legitimacy*, 89.

⁵⁷³ This is discussed further *infra*: Chapter 5, in the context of Schmitt's attitude towards natural law doctrine.

⁵⁷⁴ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 61.

⁵⁷⁵ On this point, see discussion of Hobbes' rationale for the formation of the sovereign state, *supra*: section 5.

⁵⁷⁶ *Supra*: Seitzer 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis', 203-224.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 71: 'Hobbes' theory of the state would certainly have been a peculiar philosophy of state if its entire chain of thought had consisted in propelling poor human beings from the utter fear of the state of nature into the similar fear of a domination by a Moloch or a Golem'.

brute power of this act of decision-making serves both to underpin Schmitt's notion of legitimacy and to justify his condemnation of Kelsenian normativistic legality, insofar as *'the ground of the legal system [is] a blind spot unapproachable by Kelsen's theory of law for reasons internal to Kelsen's system'*.⁵⁷⁹ In the legally ungrounded decision putatively lies not only the foundation of every legal order but also its ultimate panacea.

This is not all. To Schmitt, as with De Maistre, infallibility lies in the essence of the sovereign decision that cannot be appealed.⁵⁸⁰ The unchallengeable sovereign is both the indivisible source of law and the sole arbiter of its rectitude. Problematic though this would be, even were Schmitt to adopt an anthropologically optimistic evaluation of Man's inherent disposition, the obverse is true.⁵⁸¹ Perhaps less extreme than Donoso Cortes with his contempt for *'the natural depravity and vileness of man'*,⁵⁸² Schmitt, at least obliquely, supports the dogma of original sin,⁵⁸³ though he is at pains to stress that the distinction between good and evil *'is to be taken here in a rather summary fashion and not in any specifically moral or ethical sense'*.⁵⁸⁴ For him, *'all genuine political theories presuppose man to be 'evil', that is, by no means an unproblematical, but a*

⁵⁷⁹ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 51; see also: *supra*: Baume 'On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt', 369-381: 'Pure normativism for Schmitt excluded the affirmation of a decision, which is always a danger for the stability of the state. If one were to summarise the danger that Schmitt tried to avoid, it would be the situation that the state dies legally'.

⁵⁸⁰ *Supra*: Schmitt *Political Theology*, 55. Schmitt's apparent allegiance to Hobbes is evident here but a vital distinction does exist in that there is a natural law limitation to Hobbes' sovereign, reflective of the role of equity in inhibiting the summary justice of the king. This is discussed further in connection with Schmitt's stance towards natural law *infra*: Chapter 5. On this point, see also *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 202.

⁵⁸¹ See *supra*: Schmitt *Political Theology*, 56, where Schmitt appears to disparage the rationalism of the enlightenment which regarded Man as, by nature, ignorant and rough but educable. He continues by commenting on the Marxist view that the nature of man is incidental because Marxism believes that economic and social conditions can change the character of men. Finally, he makes the point that, 'to the committed atheist anarchist, man is decisively good and all evil is the result of theological thought and its derivatives, including authority, state and government'.

⁵⁸² *Ibid*: 58; Schmitt states that Cortes radicalised the dogma of original sin 'polemically into a doctrine of the absolute sinfulness and depravity of human nature.' Schmitt further remarks that De Maistre as well was 'capable of being shocked by the wickedness of Man'

⁵⁸³ *Ibid*: 59: This is presumably reminiscent of Schmitt's own Roman Catholic provenance. Schmitt refers to Donoso Cortes as the 'Catholic Spaniard'.

⁵⁸⁴ *Ibid*; see also *supra*: Weiler *From Absolutism to Totalitarianism*, 72 where Weiler articulates the distinction between Hobbes' natural and innocent evil compared with Schmitt's concept of evil. This is not to be interpreted in a moral sense but rather, as an admiration of animal power. Here, Weiler draws inspiration from Leo B Strauss *Notes* (translated by J. Harvey Lomax, Chicago: Chicago University Press, 1995) on Carl Schmitt's *The Concept of the Political* as an Appendix to *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der Begriff des Politischen*, 1932 edition (Berlin: Duncker & Humblot, 1932), 100.

'dangerous and dynamic being'.⁵⁸⁵ But how is Schmitt able to reconcile his pessimistic view of Man's innate disposition with the lack of legal constraints he seeks to impose upon his sovereign?

In this, he appears *'all too optimistic about the motivations and actions of a sovereign in the state of exception'*.⁵⁸⁶ Like Hobbes, with his belief in the innate, though innocent evil of Man in the state of nature, Schmitt is seemingly indifferent to the paradox he creates. At one moment, he acknowledges Bonald's recognition of *'the fundamentally evil instinct of man'* and Man's *'indestructible will to power'*.⁵⁸⁷ Yet, in the next, he ascribes to the sovereign limitless power not only to act in the existential emergency but to determine when such a state of exigency arises, the duration of the threat and the measures, if any, to be taken upon its cessation. If raw power is liable to transfix the dynamically and dangerously inclined sovereign so utterly, why does Schmitt believe that the same person will blithely relinquish dominion upon restoration of civil stability? Or that one so mesmerised by unbridled authority will begin to acknowledge that the state of imminent peril has come to an end:

*'Neither Hobbes nor Schmitt applied realism thoroughly. They begin with a pessimistic view of human nature which requires a strong sovereign to assure order. Both assume that nothing could be worse than a situation without authority but they assume that a ruler freed from the constraints of law and the threat of legitimate resistance will rule in the common interest. This assumption contradicts their general philosophical anthropology which posits a will to power that tends towards disorder and violence. Like Hobbes, Schmitt is open to Locke's complaint that a person should not have to avoid the dangers of the state of nature by placing himself within the power of a potential tyrant.'*⁵⁸⁸

Ironically, the sole pre-conception of mankind's natural disposition that renders sovereign rule obsolescent is Man's innate goodness. Only then does an authoritarian form of governance not have cataclysmic consequences since an intrinsically beneficent sovereign is never likely to abuse his office. But where mankind is innocently 'bad' in an animalistic sense - as with Hobbes; evil from the theological perspective of 'original

⁵⁸⁵ *Supra*: Schmitt *The Concept of the Political*, 61.

⁵⁸⁶ *Supra*: Samples 'Review of The Crisis of Parliamentary Democracy', 205-214.

⁵⁸⁷ *Supra*: Schmitt *Political Theology*, 58.

⁵⁸⁸ *Supra*: Samples 'Review of The Crisis of Parliamentary Democracy', 205-214.

sin'; or 'dangerous' and 'risky',⁵⁸⁹ the legally unconstrained discretionary 'will' of the sovereign is potentially devastating.⁵⁹⁰

In hindsight, Schmitt's apparent lack of prescience in failing to acknowledge, far less address the very real possibility of legally unrestrained tyrannical despotism, evokes considerable pathos. Self-servingly opportunistic though he appears in his 1938 appropriation and distortion of the Hobbesian tenet: '*what effectively governs are force and power; throne and master. Mere values do not hold true*',⁵⁹¹ the consequences of this had already tragically materialised during the mid-1930s and were to bear further bitter fruit in the unparalleled perversions of Nazism.⁵⁹² Given that the Nazis were masterful exponents of untrammelled dictatorship was it, therefore, Schmitt who paved the way? Perpetrators of a fascist regime that witnessed not merely subversion but obliteration of the rule of law, characterised by *ad hoc*, targeted and often arcane 'law-making' of the most arbitrary and indefensible type; a system of domination where *ex post facto* utilisation of criminal law and punishment ran amok for twelve long years.⁵⁹³

Unsurprisingly, however, Schmitt neither possessed clairvoyant facility nor, in the 1920s, was it viable for him to *retrospectively* evaluate his handiwork. Because his concern lay primarily with the *contemporaneous* concrete disorder bedeviling the Weimar Republic and its eradication was it, perhaps, that he simply failed to grasp the horrendous repercussions of the normatively unrestrained dictatorship he appeared to admire?⁵⁹⁴ What *is* clear is that, in the face of what he deemed an existential threat to

⁵⁸⁹ *Supra*: Schmitt *The Concept of the Political*, 58.

⁵⁹⁰ *Supra*: Strauss *Notes*, 98: Strauss posits that Schmitt needs to nullify the view of human nature as 'innocent' and to return to the view of human evil as 'moral baseness'.

⁵⁹¹ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 81.

⁵⁹² *Supra*: Wolin 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', 424-447: 'It is very important to recognise the historical-contextual basis of such arguments. It was precisely this vitalist conservative revolutionary devaluation of political normalcy, coupled with an exaggeration of emergency powers or governance by emergency decree (as in Article 48), that formed an indispensable precedent for the advent of Hitler's dictatorship'.

⁵⁹³ *Supra*: Salter 'Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's Critical Theory of Law', 161-194: 'A Fascist state is governed by irrationalism where a lawless and arbitrary form of social domination prevails; one which is totally opposed to any semblance of internal democratic ideals of constitutional-legality'.

⁵⁹⁴ *Supra*: Holmes *The Anatomy of Antiliberalism*, 60: 'Unlike Schmitt who believes that all those other than the sovereign entity need to be ruled, Holmes applauds liberals for their recognition that because all men have chaos in their souls, all men need to be governed, both rulers and ruled.' Accordingly, 'anyone [like Schmitt] who tries to protect individual security by assigning unlimited power to a single political leader must seriously underestimate the all-pervasiveness of human sin'.

the security of the German state, it was the potentiality of Article 48 that was both catalyst and empirical framework for his intensification of emergency powers. Embedded within this was his theoretical trinity of exception, sovereignty and decision and, as above, it was in the synthesis of his theory of the exception that with exquisite deftness, Schmitt was able to elevate his embrace of the emergency situation into a eulogy.⁵⁹⁵

Yet, his task was still not done. The inchoate nature of Schmitt's enterprise emerges in his *The Concept of the Political (CP)* of 1927.⁵⁹⁶ It is here that further potent threads materialise within his theoretical skein, as his Weimar programme proceeds closer to fruition. What precipitates this momentous move is Schmitt's determination to more fully explore and explicate the potentiality of the decision, by specific reference to his polemic against the flaws he deems endemic within liberalism.⁵⁹⁷ Characterised by lack of any moral or ideological foundation and spawned from an act of normatively-unrestrained sovereign will in a moment of extreme exigency, the *decision* is, to Schmitt, fundamental to the establishment and proper operation of the 'legal order'. But against the backcloth of Schmitt's pessimistic anthropological perception of humankind, *where* precisely does this decision lie?

⁵⁹⁵ Henry Grosshans 'Review of Political Romanticism' *TELOS* No. 72, (Summer 1987), 214-217: 'The irony in Schmitt and his valorisation of the concrete situation takes place within the security of the bourgeois society still suffering from the "romantic" ideas Schmitt deplored'.

⁵⁹⁶ *Supra*: Schmitt *The Concept of the Political*. This was amended, in part, to address Leo Strauss' concerns arising from Schmitt's concept of the 'political' first elucidated in the 1927 edition. On this point, see *supra*: Strauss *Notes*, 83.

⁵⁹⁷ Schmitt's concept of the 'political' – of the friend/enemy antithesis – is only fully explicable when viewed in the context of his polemical derision of liberal ideology. This is explored *infra*: this Chapter, as is the significance of 'the political' in the theatre of international strife.

The 'where': the 'political'

'Did Schmitt ask too much from politics in terms of meaning and too little in terms of morality?'⁵⁹⁸

As its title suggests, *The Concept of the Political* contains Schmitt's unique formulation and deployment of 'the political'. But what underpins the political; why does it have such profound significance within Schmitt's work; what is it and how is it related to the exception and the grounding of the legal order? From whose perspective does Schmitt ordain that the political must be assessed and to what extent is this reliant upon his subjugation of the legal norm and his ostensible abnegation of individual rights in favour of a more communitarian stance? Finally, how does this impinge upon Schmitt's stance towards retrospectively-deployed criminal law?

What underlies Schmitt's theoretical approach in *CP* is his previously articulated belief in the innate dangerousness and possible diabolism of humankind:

'Because the sphere of the political is, in the final analysis, determined by the real possibility of enmity, political conceptions and ideas cannot very well start with an anthropological optimism. This would dissolve the possibility of enmity and thereby, every specific political consequence.'⁵⁹⁹

A predisposition to 'goodness' inevitably eliminates the possibility of enmity and with it, any schism between human beings. Without enmity, each is inevitably friend to the other and it is this prospect of universal amity that Schmitt abhors. Empirical events appear here to buttress Schmitt's analysis. Ever the realist – at least, perhaps, about the intrinsic nature of Man – Schmitt is able to point to the frequent crises that undermine internal civil harmony and national security. Would civil unrest and social turbulence ever occur in the absence of human avarice, ruthlessness and lust for power?

As above, the state of dire and imminent crisis integral to the exception involves the most fundamental ontological point of inquiry: the distillation and reduction of every aspect of life into the existential battle for survival. Immanent to the exception is a life and death conflict. At this point, Schmitt conflates his earlier conceptualisation of the *exception* with the thematic threads encapsulated within *CP*. Within the exception, enmity is rife. It comprises the vehicle through which to draw the vital distinction

⁵⁹⁸ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 249.

⁵⁹⁹ *Supra*: Schmitt *The Concept of the Political*, 64.

between ‘friend’ and ‘enemy’ and thereby grasp the *‘factual condition of being an enemy of the state’*.⁶⁰⁰ Without fear of death – or more specifically, violent death, the state cannot function.⁶⁰¹ It is this condition of trepidation that evokes the pivotal antithesis between friend and enemy and is, therefore, to be embraced rather than suppressed.⁶⁰² *This is ‘the political’*.

Unlike Hobbes, who focuses on combating the innocent evil of Man, Schmitt is *‘more concerned with its recognition, admiration and harnessing it to underpin the friend/enemy dichotomy’*,⁶⁰³ he wishes to formulate. For Hobbes, the construction of civil society is a welcome refuge from the contentiousness that is rampant within the natural state.⁶⁰⁴ Conversely, Schmitt strives to affirm the dynamic dangerousness of Man to prevent a return to the pre-state condition.⁶⁰⁵

‘Schmitt aestheticized violent conduct to generate fear but why he did so is debatable. Hobbes emphasizes reason as the capacity within Man to make life improve. Schmitt must revive the fear that led to the termination of the state of nature to prevent a reversion back to it.’⁶⁰⁶

The friend/enemy antithesis, in its stark unvarnished reality, is synonymous with ‘the political’: *‘irreducible, fundamental and elementary’*.⁶⁰⁷ To Schmitt, neither morality

⁶⁰⁰ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 171

⁶⁰¹ On this point, see *supra*: Schmitt ‘The Age of Neutralisations and Depoliticisations’, 130 where the 1929 Schmitt indicates that life is of no value if death is its only antithesis. Presumably therefore, it is not death that gives meaning to life but the fear of dying; the struggle to preserve existence: ‘Whoever knows no other enemy than death and recognises in his enemy nothing more than an empty mechanism is nearer to death than to life’.

⁶⁰² See *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 245: ‘Schmitt maintained the belief that in politics, genuine legitimacy would necessarily imply the possibility of meaningful enmity. Only enmity would endow human life with dignity and seriousness’.

⁶⁰³ See *supra*: Strauss *Notes*, 98; also *supra*: Scheuerman *The End of Law*, 247 where Scheuerman states that ‘Strauss is right to point out that Hobbes hopes to overcome violence of the state of nature whereas Schmitt restores the concept of the state of nature to a place of honour. For Hobbes, the fact that the state of nature is a state of enmity of all against all is adduced so as to yield a motive for the relinquishment of the state of nature. Against this negation of the state either of nature or the political, Schmitt sets the affirmation of the political’; cf *supra*: Gottfried *Carl Schmitt Politics and Theory*, 120 where, in a controversial reading of Schmitt, Gottfried posits that ‘contrary to Leo Strauss’ judgment, Schmitt did not transfer Hobbes’ state of nature into political life. Though Schmitt linked the political with struggle, he also defended the sovereign state as a means of subduing the political, both domestically and politically’.

⁶⁰⁴ Schmitt endorses this in his *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 67: ‘Hobbes denied and negated the state of nature in the true and perfect civil state’.

⁶⁰⁵ See Paul Gottfried ‘*The Nouvelle Ecole of Carl Schmitt*’ *TELOS* Number 72, Summer 1987, 202-205

⁶⁰⁶ John P. Mc.Cormick ‘Fear, Technology and the State’ *Political Theory* Vol. 22 No.4, November 1994, 619-652.

⁶⁰⁷ *Ibid*: Mc.Cormick; see also *supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424-447: ‘Struggle, like the enemy, is to be understood in its existential primordially’.

nor any other normative consideration is germane, for ‘*the man who affirms the political is eager for a decision, regardless of content*’.⁶⁰⁸ Consequential upon Schmitt’s dismissal of ‘*normative ideals*’ and ‘*abstractions*’ as ‘*nothing but fictions*’,⁶⁰⁹ the political is not susceptible to ideological or moral evaluation.⁶¹⁰ ‘The political’ flourishes within and as a prelude to the normative wilderness of the exception;⁶¹¹ even perhaps as an encroachment upon the legal- constitutional order itself. The distinction between friend and enemy; the emergence of the political is precisely *where* the sovereign decision lies:

‘The friend enemy grouping is always the decisive human grouping; the political entity. If such an entity exists at all, it is always the decisive entity and is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there.’⁶¹²

Crucially, therefore, the ‘political’ does not comprise the *locus* of the decision in the exception alone. Rather, because ‘*the concept of the state presupposes the concept of the political*’,⁶¹³ the decision determinative of friend and enemy constitutes the bedrock of every ‘legal order’.⁶¹⁴ Theoretically akin to Hobbes’ state of nature where each man is the enemy of the rest, the political is the foundation stone upon which the entire state

⁶⁰⁸ *Supra*: Strauss *Notes*, 105; see also *supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’ *Political Theory* Vol 20, No.3, August 1992, 424-447: ‘Schmitt’s attempt to separate politics from morality, allegedly in the name of preserving the autonomy of the political, also raises suspicions of intellectual chicanery’; cf. Heinrich Meier *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (Chicago and London: The University of Chicago Press, 1998) trans. Marcus Brainard from *Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie*, 1994. Here, Meier argues that Schmitt’s use of the friend/enemy dichotomy is primarily an attack on the anti-Christ. Meier, therefore, believes that Schmitt’s theory has natural law elements embedded within it. This is discussed *infra*: Chapter 5.

⁶⁰⁹ *Supra*: Schmitt *The Concept of the Political*, 28.

⁶¹⁰ *Supra*: Strauss *Notes*, 93; see *supra*: Scheuerman *The End of Law*, 249: ‘Schmitt never adequately frees himself from his problematic insistence that politics and morality are basically unrelated’.

⁶¹¹ See *supra*: Dyzenhaus *Legality and Legitimacy*, 50, where Dyzenhaus highlights that, in Schmitt’s view, politics is prior to and transcends all law. The necessity of politics is that a decision has to be made and all else, morality, state and law, falls out of the discussion: ‘The moral is not justification for the political but is brought into force by the political’; also *supra*: Nicoletti ‘Carl Schmitt *nella Stampa Periodica Italiana*’, 217-225: ‘Schmitt’s political concept is always polemical. It involves a real adversary between the concrete situation and political battle. Politics exists before the state as an existential possibility; the state is only the historical expression of the friend/enemy polarity’.

⁶¹² *Supra*: Schmitt *The Concept of the Political*, 38.

⁶¹³ *Supra*: Schmitt *The Concept of the Political*, 19.

⁶¹⁴ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 102: Balakrishnan posits that, to Schmitt, ‘conflict is a primordial condition which gives meaning to the word, ‘political order’. The state is secondary perhaps because order arises out of this primordial conflict without ever really suppressing it’.

edifice balances.⁶¹⁵ But unlike Hobbes' visualisation of the state of nature, where individuals 'enjoy' pre-constitutional but chiefly unenforceable rights conferred by the Laws of Nature, Schmitt's version of the pre-state order materially differs. For Schmitt, it is not that norms do not hold sway prior to inauguration of the state; they are simply non-existent. Only through the power of sovereign decision are norms both created and enforced. Because this decision lies in the political, nothing to Schmitt is more regrettable than its destruction; the relinquishment of the capacity to distinguish between friend and enemy. To guarantee preservation of the political, the authentic decision that resides there is key.⁶¹⁶ Nor is this decision confined to the arena of international affairs for Schmitt makes it clear that the 'political' encompasses explosive domestic conflicts as well as foreign wars.⁶¹⁷

Given that the decision is non-normative in provenance and is seemingly located in the distinction between friend and enemy, how does Schmitt define 'the political'? Put simply, he does not. Rather, he stresses that the political provides a criterion, entirely autonomous of any other, '*not as an exhaustive definition or one indicative of substantial content*':⁶¹⁸

'Precisely because of the uniqueness of events, Schmitt found it impossible to provide an exhaustive or even a general definition of politics, one that would always hold true. By combining his belief in the uniqueness of events with his belief that man is essentially

⁶¹⁵ See *supra*: Scheuerman *The End of Law*, 67: 'The constitution rests on an authoritarian decision made by a concrete will. Legitimacy requires no justification either by ethical or juridical norms'; also on this point, *supra*: Mc.Cormick 'Fear, Technology and the State' *Political Theory* Vol. 22 No.4, November 1994, 619-652; also *supra*: Strauss, *Notes*, 83ff for a provocative discussion of the parallel between Hobbes' state of nature and Schmitt's 'political'. *Ibid*: Strauss, 101; Strauss posits, somewhat controversially, that Schmitt's affirmation of 'the political' is ultimately no more than an 'affirmation of the moral' and that Schmitt's use of the political to condemn liberal ideology, is stranded within the horizon of liberalism: *ibid*: Strauss, 104; also Tracy B. Strong *Foreword to The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) translated by George Schwab from *Der Begriff des Politischen*, 1932 edition, Berlin: Duncker & Humblot, 1932), xviii where Strong summarises Strauss' critique of Schmitt: 'Schmitt has, albeit unwillingly, moralised even his would-be amorality'. Strauss' view is shared by Heinrich Meier *Carl Schmitt and Leo Strauss: the hidden dialogue* (Chicago and London: The University of Chicago Press, 1995) trans. J. Harvey Lomax from *Carl Schmitt, Leo Strauss und "Der Begriff des Politischen": Zu einem Dialog unter Abwesenden*, 1988.

⁶¹⁶ *Supra*: Dyzenhaus *Legality and Legitimacy*, 47.

⁶¹⁷ See *supra*: Scheuerman *The End of Law*, 233; also *supra*: Schwab *Introduction to Political Theology: Four Chapters on the Concept of Sovereignty*, xxi: 'Schmitt saw the friend/enemy distinction as operating to domestic affairs as well as to relations between or amongst states'; the specifically international aspects of the 'political' are explored *infra*: Chapter 5; also *supra*: Schmitt *The Concept of the Political*, 46: 'As long as a state is a political entity, this requirement for internal peace compels it in critical situations to decide upon the domestic enemy. Every state provides, therefore, some kind of formula for the declaration of an internal enemy'.

⁶¹⁸ *Ibid*: Schmitt, 26.

dangerous, Schmitt advanced a simple criterion of politics which has so far proved to be constant, namely, the distinction between friend and enemy.’⁶¹⁹

Whilst the friend/enemy antithesis may correspond to other antitheses, for example, good and evil in the moral sphere; beautiful and ugly in the aesthetic sense and so forth, ‘it can exist theoretically and practically, without having to draw upon all those moral, aesthetic or other distinctions’.⁶²⁰ What is vital, therefore, is the capacity of the political to subsist separately from any other sphere of operation, as evidenced by its ‘being able to treat, distinguish and comprehend the friend-enemy antithesis independently of other antitheses’.⁶²¹ But does Schmitt envision that the political shall be confined to some undefined rarefied dimension, divorced from all others? If so, what is its prospective utility? Is the political destined to remain a purely theoretical construct? In his *CP* (1932), Schmitt clarifies his earlier exposition of the political.

Though he still envisages that the friend/enemy antithesis may subsist as an agonal relationship, discrete from all other areas of antagonism, he is now anxious to embrace its ubiquitous influence. Few, if any spheres of activity, are without intrinsic tension and as this escalates to a crescendo; to the ‘most intense and extreme’⁶²² point of discord, the political springs into being and with it, the ‘friend-enemy grouping’.⁶²³ This denotes the ‘utmost degree of intensity of a union or separation of an association or dissociation’.⁶²⁴ To this end, Schmitt constantly emphasizes the need for concrete antagonism; the potentiality for conflict latent in every zone of life.⁶²⁵ Ironically, this same conviction that ‘all social and legal problems are potentially political, involving conflict over the monopoly of power, places him’ - the arch conservative authoritarian

⁶¹⁹ George Schwab *Introduction to The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) translated by George Schwab from *Der Begriff des Politischen*, 1932 edition, (Berlin: Duncker & Humblot, 1932), 7.

⁶²⁰ *Supra*: Schmitt *The Concept of the Political*, 27.

⁶²¹ *Ibid.*

⁶²² *Ibid.*: 29; for re-iteration of this, see Carl Schmitt ‘State Ethics and the Pluralist State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 309.

⁶²³ *Ibid.*: Schmitt *The Concept of the Political*, 29.

⁶²⁴ *Ibid.*: 26.

⁶²⁵ See *supra*: Holmes *The Anatomy of Antiliberalism*, 42: ‘Schmitt is at his most un-Hobbesian when he toyed with bellicism’; also *supra*: Schmitt *The Crisis of Parliamentary Democracy*, 71: ‘The value of life stems not from reasoning; it emerges in a state of war where men, inspired by myth, do battle’; see also *supra*: Scheuerman *The End of Law*, 228: ‘Political conflicts are those denoting the most extreme degree of intensity in struggles between opposed constellations of friends and foes, not those focussing on a priori set of objects or concerns. Moral, economic, or aesthetic difference becomes political when it gains an especially intense character so that in the extreme case, conflicts are imminent’.

and theorist of the strong executive state - '*in a certain involuntary proximity to left-oriented theory*'.⁶²⁶

Unsurprisingly, elimination of the possibility of real war; of conflict at the zenith of its intensity, is anathema to Schmitt.⁶²⁷ For what is indispensable to the existence of any valid legal order is the decision upon whether or not the point of bellicosity has actually materialised.⁶²⁸ Does then the 'exception' undermine Schmitt's affirmation of the political? Evidently not, because however anomalous the circumstances prove, this serves to reinforce rather than negate the cogency of the decision upon the friend-enemy antithesis:

'War is today the most extreme possibility. One can say that the exceptional case has an especially decisive meaning which exposes the core of the matter. For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy. From this most extreme possibility, life derives its specifically political tension.'⁶²⁹

At this point, does Schmitt compound or mitigate the potential fragility of the political by his conceptualisation of 'friend and enemy'? Again, he seeks recourse in the concrete reality, not the legal norm. The friend, enemy and combat concepts are accorded their real meaning '*because they refer to the real possibility of physical killing*' in which '*war is the essential negation of the enemy*'.⁶³⁰ Founded upon neither a normative nor spiritual antithesis, the concepts of friend and enemy are to be understood purely in a

⁶²⁶ *Supra*: Seitzer *Introduction to Constitutional Theory*, 45; this provides one reason why, following the demise of Marxism, left-of-centre journals such as *TELOS* take such interest in Schmitt's theoretical position.

⁶²⁷ See Gary Ulmen 'Just Wars or Just Enemies' *TELOS* No. 109, (Fall 1996), 99-113: 'Rationally, it cannot be denied that nations continue to group themselves according to the friend/enemy antithesis, that the distinction still remains relevant today and that this is an ever present possibility for every people existing in the political sphere'.

⁶²⁸ See Gary Ulmen 'Return of the Foe' *TELOS* No. 72, (Summer 1987), 187-194, for a discussion upon Schmitt's conceptualisation of the enemy. Whilst existing as an enemy in the public sphere, this is not equivalent to the traditional concept of the 'foe', to be zealously exterminated as the target of a so-called 'just' war. This is explored further *infra*: Chapter 5. On Ulmen's reading: 'the key to the concept of the political is not enmity but the distinction itself between friend and enemy; the ever-present possibility of conflict. To blur the distinction between friend and enemy is to blur the distinction between war and peace'; also Paul Hirst 'Carl Schmitt's Decisionism' *TELOS* No. 72, (Summer 1983), 15-27 where Hirst argues that the state must impose internal order to enable it to pursue external conflict; also *supra*: Schmitt *The Crisis of Parliamentary Democracy*, 69: 'Against the mercantilist image of balance, there appears another vision; the warlike image of a bloody, definitive, destructive, decisive battle'.

⁶²⁹ *Supra*: Schmitt *The Concept of the Political*, 35.

⁶³⁰ *Ibid*: 33.

concrete and existential sense. Hence, categorising them as metaphors and symbols is wholly erroneous.⁶³¹ Neither necessarily morally nor aesthetically evil:

‘The enemy is nevertheless the other, the stranger, and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so the in the extreme case, conflicts with him are possible.’⁶³²

But who precisely is ‘the enemy’? Schmitt stipulates that it is ‘*solely the public enemy*’; *hostis not inimicus*’.⁶³³ Whilst he concedes the feasibility of loving one’s enemy in the private sphere, this is not a luxury extended to the political enemy. One need not hate the enemy in the public sense but what *does* matter is that no one shall ‘*love and support the enemy of his own people*’.⁶³⁴ Crucially, this transforms the person affiliated to such ‘enemy’ into a state enemy, no longer deserving of the designation: ‘friend’.⁶³⁵

Nor is the categorisation of friend and enemy a decision capable of extrinsic validation. Within the political, and its attendant existential decision between friend and enemy, the objectivity of the legal norm has no place. Born entirely from the subjectively-adjudged existential threat to the protagonists, no one save them possesses the capacity to recognise, comprehend and settle the ‘*extreme case of conflict*’.⁶³⁶

‘Each participant is in a position to judge whether the adversary intends to negate his opponents’ way of life and must therefore be repulsed or fought in order to preserve one’s own form of existence.’⁶³⁷

This particularistic act of distinguishing between the categories of ‘friend’ and ‘enemy’; the moment when the ‘*enemy, is, in concrete clarity, recognised as the enemy*’ is, to Schmitt, ‘*the high point of politics*’.⁶³⁸ But conversely, is it this same vital, if radical subjectivity that constitutes the ‘*danger in Schmitt’s political*’?⁶³⁹ If the decision

⁶³¹ *Ibid*: 28.

⁶³² *Ibid*: 26.

⁶³³ *Ibid*: 25.

⁶³⁴ *Ibid*: 29.

⁶³⁵ See *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 246; Muller cites an extract from Schmitt’s *Ex Captivitate Salus*, 90, an extended poetic piece written during his post-war period of captivity: ‘*woe to him who has no enemy because I will be his enemy on Judgment Day*’.

⁶³⁶ *Supra*: Schmitt *The Concept of the Political*, 27.

⁶³⁷ *Ibid*; see also Paul Hirst ‘*Carl Schmitt’s Decisionism*’ *TELOS* No. 72, (Summer 1983), 15-27: ‘*Schmitt’s perception of politics as friend/enemy relations explain how Schmitt changed his contempt for Hitler to endorsing Nazism*’.

⁶³⁸ *Ibid*: Schmitt, 67.

⁶³⁹ *Supra*: Mc.Cormick ‘*Fear, Technology and the State*’, 619-652: ‘*The lack of objective criteria for determining what is a threat to the individual’s self-preservation transforms the natural right into the*

between friend and enemy is not subject to legal-constitutional constraints, how is its validity to be assessed? Seemingly, this is of no concern to Schmitt. Rather, indicative of the refrain that consistently permeates his work, all that matters here is the concrete reality, as interpreted from the arguably jaundiced perspective of those directly affected by it. From this flows all that is meaningful about life.⁶⁴⁰ Implicit within this is the elevation of politics over all normative or moral concerns and the concomitant subjugation of the purely 'legal' to what Schmitt perceives to be the vibrant force of the 'political':

'Rather than living with the tension between the autonomous demands of power on the one hand and moral justification on the other, Schmitt dissolved the tension by opting for a politics cleansed of morality. This produced a kind of existential meaning through struggle.'⁶⁴¹

But without extrinsic normative constraints, is not the political overly susceptible to the vagaries of the concrete reality and the sovereign will that resides there? How does Schmitt prevent his concept of legitimacy, grounded in the existential decision between friend and enemy, from collapsing into dictatorial despotism? What role, therefore, subsists for the publicly promulgated general norm in an existence characterised by *ad hoc* responsive rule-making valid in and for the moment of concrete exigency?

Though rarely articulated in explicit terms, other than by an evident devotion to the concrete reality, Schmitt would doubtless assert numerous advantages intrinsic to his system: amongst them, malleability, flexibility, discretion and rapidity of reaction. But is not this type of regime feasible only because Schmitt accords supremacy to the unassailable authority of a sovereign will, supposedly determinant of every fissure within civil society? How then are pre-established norms able to subsist, far less flourish? This appears of little consequence to Schmitt for whom '*state and politics cannot be exterminated*'.⁶⁴² Neither the state nor indeed the global geo-political matrix may function effectively in an existence where a slavish adherence to a closed system of

organ of the potential war of all against all. Schmitt drops the natural right and emphasizes the potential war?.

⁶⁴⁰ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 113, n.31: Balakrishnan refers to Schmitt's post-war notebooks *Aufzeichnungen der Jahre 1947-1951*, 220 where Schmitt explains that it is the indeterminacy of the enemy which evokes anxiety. By contrast, it is a matter of reason to determine who is the enemy (always the same as self-determination) and with this self-determination the anxiety stops and, at most, fear remains. Schmitt therefore seems to have a morbid fear of the concealment of the enemy.

⁶⁴¹ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 249.

⁶⁴² *Supra*: Schmitt *The Concept of the Political*, 78.

legal norms prevails; where all that matters is ‘law’ conceived as performance and function, rather than as content and justice. If law has no substance, it becomes neutral to its own existence and cannot safeguard itself. It is stripped of value because it does not perceive its own worth. But does any superior guarantee of substantive ‘justice’ reside within the type of governance that Schmitt promotes? One where sovereign decision upon the friend enemy antithesis reigns supreme; where voluntarism overrides the legal norm and all prospect of objectivity seemingly evaporates along with pre-established and procedurally-compliant legal-constitutional regulation:

‘No political form has emerged that could have embodied proper enmity in a way that did not end in political and moral catastrophe.’⁶⁴³

Despite the dangers latent within this acclamation of the political, its eradication or, what Schmitt terms, ‘*depoliticalization*’⁶⁴⁴ is, however, barely conceivable. It spells nothing but antipathy and futility. The political denotes the lifeblood of humankind, without which the value of life is unacceptably impeached. To Schmitt, no potential imperilment lies within the political but only in its elimination.⁶⁴⁵ If, therefore, the preservation of the political culminates in the marginalisation of the general norm, then this is a fully warranted sacrifice:

‘A politics of dictatorship, grounded in a decision *ex nihilo* will bring Schmitt’s solution to an era of relentless depoliticization.’⁶⁴⁶

For where normative regulation obviates a decision upon the friend/enemy antithesis and thereby suffocates the political, it is the legal-constitutional framework that Schmitt implicitly renders defunct. Is it tenable, therefore, that his aggrandisement of the concrete reality, as instantiated through the political, might comfortably co-exist with a blanket embargo upon the retrospective utilisation of criminal law? For a legal order, grounded only in a sovereign decision upon the friend/enemy dichotomy, must surely valorise arbitrarily-exercised executive power. Within Schmitt’s conceptualisation, this appears associated with the suppression of every moral and normatively-based consideration. If then the principle of non-retrospectivity rests its quintessential validity

⁶⁴³ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 246.

⁶⁴⁴ *Supra*: Schmitt *The Concept of the Political*, 78.

⁶⁴⁵ *Supra*: Strauss *Notes*, 94: ‘Entanglement results if Man tries to evade the political’.

⁶⁴⁶ *Supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424-447.

upon the *Rechtsstaat* principles of generality, predictability, publicity and above all, the doctrine of separation of powers, are not all inexorably demolished within a regime that embraces the antithesis of each?

According to Schmitt, it is Hobbes who is a '*proponent of a form of state absolutism*',⁶⁴⁷ in diametric opposition to the *Rechtsstaat* concept of law. But is not a similar or still more extreme evaluation applicable also to Schmitt? It is true that Schmitt's initial excursus into the realm of dictatorship commenced at a stage when the Reich Constitution was not even in contemplation. However, Article 48 undoubtedly comprises both the inspiration and impetus for his further theoretical forays during the 1920s. Indeed, only through the medium of his unique interpretation and instrumentalisation of Article 48 does Schmitt's formulation of 'the political' and the friend/enemy dichotomy ultimately emerge. Encompassed within the political is Schmitt's acclamation and vindication of the dynamism of human sovereignty over what he deems the stifling sterility of a wholly norm-based system: in essence the subjugation of 'law' to 'politics'. But the formula for precise discernment of the political is still incomplete. It is futile to promote a condition that constantly hovers on the brink of conflict without clarification of the parties between whom enmity subsists. Within Schmitt's firmament, *who* then specifically engages in the existential struggle for life; how does he perceive the 'individual' and what are the wider ramifications of this further crucial thread in his burgeoning theoretical skein?

⁶⁴⁷ *Supra*: Schmitt *Constitutional Theory*, 182.

The ‘whom’: the role of the individual within a communitarian setting

Emergent from *CP* are telling insights into Schmitt’s stance towards the ‘individual’. First the imperative to control the chaos simmering amidst his affirmation of the political; next the ability of the state to make a decision on the friend/enemy antithesis without interference from indirect forces, that is, pluralistic factions which assert an autonomous right to challenge the state’s monopoly of decision on the political.⁶⁴⁸ Last, his distinctive interpretation and exposition of the reciprocal relationship between protection and obedience, a province so elemental to the Hobbesian construct of the state. Embedded within each are the disparate theoretical positions that characterise Schmitt’s and Hobbes’ formulation of the legal order.⁶⁴⁹

The individual within the political

As seen, Hobbes allows what he defines as the innate ‘innocent’ vices of individual human beings to pervade the state of nature, secure in his conviction that, once established, the state will chiefly oust them. Quite simply, the Commonwealth possesses sufficient coercive force to proscribe Man’s inherently ‘evil’ tendencies. Without this exclusionary capacity, the state cannot endure. One of the few residual natural rights that do penetrate the Hobbesian state fortress is the entitlement of self-preservation embedded within each individual; inauguration of the state through the rational consensus of Man, suspends the remainder. Yet, despite this preponderantly effectual nullification of individual pre-political rights it is implicit within Hobbes’ theory that they do exist, if only ephemerally. What then of Schmitt? Is Holmes accurate in his

⁶⁴⁸ See Paul Gottfried ‘*The Nouvelle Ecole* of Carl Schmitt *TELOS* No. 72, (Summer 1987), 202-205 where Gottfried refers to the similarity between Hobbes and Schmitt in that both decry indirect forces that impair the supremacy of the sovereign decision. For example, Hobbes attacked the Jesuit, Bellarmine, for his belief that a cluster of moral and spiritual influences was needed to give direction to the state.

⁶⁴⁹ It is for this reason that references are also made to Carl Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, Connecticut: Greenwood Press, 1996). This was written after Schmitt was targeted by the SS and had been spared their wrath only due to the intervention of Goring. The book contains Schmitt’s post-Weimar interpretation of Hobbesian theory. Though written during the Nazi era, it is less overtly sympathetic to the National Socialist regime than was evident during his full scale 1933-1936 rapprochement with the Nazis. This is even more evident in his 1937 piece, *The State as Mechanism in Hobbes and Descartes*, 1937 which appears as an Appendix to *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*: on this point see *supra*: Weiler *From Absolutism to Totalitarianism*, 94: ‘It is clear that the ‘Mechanism’ paper interprets Hobbes in an anti-totalitarian spirit and, indeed, a good case can be made that when Schmitt wrote it, he wanted to make a stand against the Nazis who were just then doing away with the rule of law. This is the high point in Schmitt’s career’.

claim that in ‘Schmitt’s virulent anti-individualism’,⁶⁵⁰ resides the striking divergence between the state theories of Hobbes and Schmitt?

Unlike Hobbes, Schmitt affirms the political; the condition of enduring angst that he demands within and not merely as a prelude to the legal order.⁶⁵¹ But where conflict exists between every human being, each to the other, then acclamation of an omnipresent fear of enmity will inexorably crystallise in mayhem. Is it then feasible for civil society to survive? How does Schmitt control the enmity he so relentlessly bestirs? His solution lies in ‘real human groupings and associations [which] rule over the other groupings and associations’.⁶⁵² At the heart of the vital demarcation between friend and enemy are not individuals but communities, each with a shared sense of empirical human experience. This arises from a commonality of race, beliefs, destiny and tradition.⁶⁵³ The feasibility of such congregates of human beings hinges on homogeneity; on the idea of substantive ‘belonging’.⁶⁵⁴ As the homogenous entity of ‘the people’ finds its point of identification in and with the state, the functional utility of the unified ‘*demos*’ lies in its capacity to absorb the atomised individual within it.⁶⁵⁵

In consequence, individual antipathies and affiliations are alien to the friend-enemy decision. Nothing must encroach upon the untainted facticity of the friend/enemy concepts, ‘least of all in a private individualistic sense as a psychological expression of private emotion and tendencies’.⁶⁵⁶ It is the location of hostility within constellations of human beings that enables Schmitt to delimit the enmity he seeks to promote. Man’s

⁶⁵⁰ *Supra*: Holmes *The Anatomy of Antiliberalism*, 42.

⁶⁵¹ See *supra*: Scheuerman *The End of Law*, 232: ‘Politics is bloodthirsty because human beings are bloodthirsty’.

⁶⁵² *Supra*: Schmitt *The Concept of the Political*, 72; see *supra*: Grosshans ‘Review of *Political Romanticism*’, 214-217 where Grosshans highlights that concrete groupings, between which concrete conflict might occur, are paramount to an understanding of Schmitt’s theory.

⁶⁵³ Schmitt makes his concept of homogeneity still more explicit one year later in his *Constitutional Theory*, 258. He speaks of the unity of the nation: common speech, common historical fates, traditions and memories, common political goals and aspirations. Language, whilst important, is not decisive for authentic revolutions and victorious wars can overcome linguistic oppositions and establish a feeling of national belonging, even when the same language is not spoken. For Schmitt, political homogeneity in the Weimar Republic is elusive.

⁶⁵⁴ This is further explored below in connection with Schmitt’s conceptualisation of ‘democracy’ and its supposed correlation with, rather than antithesis to dictatorship; on this issue, see *inter alia supra*: Schmitt *Constitutional Theory*.

⁶⁵⁵ *Ibid*: 247; Schmitt highlights the importance of the existing people establishing self-identity as a political unity. This arises ‘if by virtue of its own political consciousness and national will, it has the capacity to distinguish between friend and enemy’.

⁶⁵⁶ *Supra*: Schmitt *The Concept of the Political*, 28.

inherently antagonistic nature becomes at once an instrument of repression and a device with which to fortify state authority. To this extent, eradication of *individualistically* orientated strife facilitates the realisation of the political.⁶⁵⁷ In this, Schmitt purports to draw inspiration from Hegel:

‘The bourgeois is an individual who does not want to leave the apolitical private sphere. He rests in the possession of his personal property and, under the justification of his possessive individualism he acts as an individual against the totality. He wants to be exempted from the dangers of a violent death.’⁶⁵⁸

Through his insistence that *‘the subjects of the state of nature are not individuals but totalities’*⁶⁵⁹ Schmitt seeks to imbue the political with internal coherence. No longer does the friend/enemy antithesis witness its consummation in vendettas between self-serving individuals but in the real-life existential struggle between communitarian groupings.⁶⁶⁰ Through this alignment between homogenous assemblages, the battle-lines are drawn. Integral to this conceptualisation is the inexorable subsumption of the individual. But if Schmitt relegates the individual to nothing more than an inconsequential constituent in the unitary whole, what attendant ramifications inure for the individual in the face of the exercise and potential abuse of executive power? In short, does he accord any legal-constitutional safeguards to the vestigial being that subsists?

⁶⁵⁷ See *supra*: Scheuerman *The End of Law*, 46; according to Scheuerman, Schmitt over romanticises the crisis situation and distorts much of what everyday politics is about, that is, peaceful forms of exchange and debate.

⁶⁵⁸ *Supra*: Schmitt *The Concept of the Political*, 62.

⁶⁵⁹ *Supra*: Strauss *Notes*, 93.

⁶⁶⁰ See *supra*: Wolin ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror’, 424-447: ‘Schmitt’s existential definition of politics in terms of the primacy of the friend/enemy grouping compels us to relinquish all claims to “the good life” and instead to rest content with “mere life”, namely existential self-preservation; cf. *supra*: Gottfried *Carl Schmitt Politics and Theory*, 102; Gottfried implicitly criticises the approach of those who allege that Schmitt ignores the ‘ties of friendship’ that sustain political societies whilst stressing the importance of common enemies in sustaining the state: ‘Because of his stress on antagonism rather than friendship, Schmitt is thought to offer a skewed picture of political life in general. It is one intended, amongst other things, to defend militaristic-authoritarian groups in his own society against constitutionally responsible civilian government.’ Gottfried, however, implies that this critique of Schmitt is unjustified.

The individual and the state

Only through scrutiny of Schmitt's pre-occupation with the political is his response to individual rights remotely explicable. For rarely, if ever, does he permit the individual to intrude in the synthesis of his dialectic between the political and the state. Without preference or interference, determination of the friend and enemy dichotomy must rest exclusively within the aegis of the sovereign entity. What is imperative, therefore, is the eradication of any influence potentially deleterious to this critical decision-making capacity. It is here that his insistence upon the monopoly of the sovereign decision dovetails with his seemingly dismissive stance towards the presumptive rights of the individual. In a wider sense, subjugation of the individual coincides also with the polemic Schmitt consistently wages against the 'rule of law' type state and the separation of powers doctrine integral to it.

Schmitt is explicit that the negation of the political '*inherent in every consistent individualism*' produces distrust '*towards all conceivable political forces and all forms of state and government*'.⁶⁶¹ To Schmitt, this is abhorrent. For where human beings acquire rights against the state, this inevitably culminates in formation of factionalised parties and interest groups, all of which drain the state of its decision-making monopoly. In Schmitt's view, this engenders a pluralistic system, beset by dangerously corrosive tendencies.⁶⁶² Numerous factions vie for supremacy and all compete one with one another and with the sovereign entity for the right to adjudge how best to safeguard the integrity of the state. Pluralism, therefore, threatens the very existence of the state that spawns it:⁶⁶³

'In "Concept of the Political" and in many of his other writings, Schmitt focussed attention on the immediate centrifugal forces tearing the Weimar state apart and on some of the intellectual underpinnings of these forces, including pluralism. As is well known, the theory of pluralism maintains that an individual is a member of many rather than just one association and no association, including the state is necessarily the decisive and sovereign one. In the competition

⁶⁶¹ *Supra*: Schmitt *The Concept of the Political*, 70.

⁶⁶² Carl Schmitt *Der Hüter der Verfassung (Guardian of the Constitution)* (Tubingen: J.C.B. Mohr Paul Siebeck, 1931), 7-9 (*HV*), 71-73 in *supra*: Caldwell, *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 112: 'The single greatest danger to the state is a multiplicity of social power complexes which take possession of state will-formation for themselves without ceasing to be social non-state creatures'.

⁶⁶³ *Supra*: Wolin 'Carl Schmitt, political existentialism and the total state' *Theory and Society* Vol. 19 (1990), 389-416: 'Since the Weimar Constitution was incapable of distinguishing between friend and enemy, it deserved to perish' (in Schmitt's view).

among associations, the individual is left to decide for himself the extent to which he may desire to become involved. Precisely such a doctrine, according to Schmitt, helps to undermine the state as the highest and most decisive entity.⁶⁶⁴

The consequential interpenetration of state and society, typified by the hyper-politicisation of society in conjunction with a ‘*drop in the level of political life*’ of the nation, proves disastrous.⁶⁶⁵ It culminates in a *quantitative* total state, unable to make the pivotal distinction between friend and enemy.⁶⁶⁶ ‘*Total out of weakness, not strength and power*’, this corrupted state-form intervenes in every area of life ‘*because it must fulfil the claims of all interested parties*’.⁶⁶⁷ Akin to the modern therapeutic or welfare state, ‘*the state must especially become involved in the economy, which until now has been free from state interference*’.⁶⁶⁸ No limits exist upon its capacity to intervene. Concomitant with this incremental fragility of the state is the incursion of a host of competing entities that ‘*remain in the twilight of an intermeddling state. They influence without accepting responsibility*’.⁶⁶⁹ Propagation of such forces fatally impairs the capacity of the state to exercise its decision-making function.⁶⁷⁰ What instead Schmitt, perhaps cynically, demands is a *qualitative* total state that accords freedom to economic

⁶⁶⁴ Tracy B. Strong *Foreword to The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der Begriff des Politischen*, 1932 edition, Berlin: Duncker & Humblot, 1932), 12; see *supra*: Schmitt *The Leviathan*, 73: ‘From the duality of state and state-free society arose a social pluralism in which the “indirect powers” could celebrate effortless triumphs’.

⁶⁶⁵ See *inter alia supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 104; if everything (other than the state) is made potentially political, then this undermines the centrality of the state to make decisions.

⁶⁶⁶ See *ibid*: 216; Balakrishnan articulates Schmitt’s view that from this division between inner faith and outer obedience developed both liberalism and legal positivism; also *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 36: ‘The quantitative total state produced excessive pluralism. The state lost the monopoly of the political and could not distinguish between friend and enemy. What Schmitt wanted was a qualitative total state – a Hobbesian authoritarian solution’.

⁶⁶⁷ *Supra*: Schmitt *Legality and Legitimacy*, 92.

⁶⁶⁸ *Ibid*.

⁶⁶⁹ *Ibid*: 87; also *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 74: ‘It is in the interests of an indirect power to veil the unequivocal relationship between state command and political danger, power and responsibility, protection and obedience, and the fact that the absence of responsibility associated with indirect rule allows the indirect powers to enjoy all the advantages and suffer none of the risks entailed in the possession of political power’.

⁶⁷⁰ Chantelle Mouffe ‘Carl Schmitt and the Paradox of Liberal Democracy’ in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999)38, 48: ‘The state is therefore weakened and becomes some kind of clearing house, a referee between competing factions. Reduced to a purely instrumental function, it cannot be the object of loyalty; it loses its ethical role and its capacity to represent the political unity of a people’; see also Carl Schmitt ‘State Ethics and the Pluralist State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 303.

strategists and agencies but possesses supreme decision-making facility in every other zone of life; that is the right to intervene on primarily political grounds.⁶⁷¹

‘The qualitative total state is above society and is therefore able to distinguish between friend and enemy. The quantitative total state is forced by society to immerse itself indiscriminately into every realm; every sphere of human existence. It knows absolutely no domain that is free of state interference because it is no longer able to distinguish anything.’⁶⁷²

Schmitt attributes this ‘regrettable’ development to the distortion and exploitation of what he deems an initially insignificant crack within Hobbes’ authoritarian arsenal: the distinction between the outer confession that Hobbes demands and the inner faith that lies within the private domain of individual conscience.⁶⁷³ On Schmitt’s reading, the ‘*distinction between inner and outer*’ becomes a ‘*sickness unto death*’.⁶⁷⁴ Gradually widened from crevice to chasm, the right to individual freedom of thought ineluctably brings forth a plethora of privileges that citizens are able to assert against the state.⁶⁷⁵ This ‘*intellectual switch*’ transforms into mere provisos ‘*the necessities of public peace as well as the right of the sovereign power*’, in deference to individual rights that become ‘*the form-giving principle*’.⁶⁷⁶ Inversion of public and private subverts state authority and culminates in a ‘*counterforce of silence and stillness*’⁶⁷⁷ that saps it of vitality. In concrete terms, a constitutional system consequentially emerges replete with

⁶⁷¹ On this point, see *supra*: Gottfried Carl Schmitt *Politics and Theory*, 74: According to Gottfried, Schmitt sees the qualitative total state as ‘self-restraining’: attending to the needs of public order and traditional statecraft without monopolising social, cultural and economic relations. Schmitt’s Marxist detractors have sardonically noted (observes Gottfried) that Schmitt wanted a ‘weak total state’ which was strong enough to hold down Communists and socialists but weak enough to allow capitalists to control the economy. But consistent with his often apologetic appraisal of Schmitt, Gottfried claims that this charge decontextualises Schmitt’s career.

⁶⁷² George Schwab *Foreword and Introduction to The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 1938, x.

⁶⁷³ On this point, see *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 56 ff; Schmitt pejoratively blames this development on Jewish philosophers, such as Spinoza and Mendelssohn; also *supra*: Weiler *From Absolutism to Totalitarianism*, 65: Weiler comments upon Schmitt’s implicit critique of Hobbes’ willingness to leave untouched the private sphere of the individual. To this extent, Hobbes had feet of clay. For example, whilst Hobbes condemned the Inquisition, Schmitt did not; *ibid.* Weiler, 83: ‘*Contra Hobbes*, mere external obedience could not be enough for him; Schmitt wanted to dominate the inner man’; also *ibid.*: Holmes *The Anatomy of Antiliberalism*, 53: Holmes comments that Schmitt’s argument about the so-called Jewish inspired conspiracy to pervert Hobbesian theory is ‘morally repulsive, theoretically confused and historically inaccurate’.

⁶⁷⁴ *Supra*: Schmitt *The Leviathan*, 65.

⁶⁷⁵ See *supra*: Dyzenhaus ‘Now the machine runs itself’, 1-19: ‘To Schmitt, Hobbes’ emphasis on individualism is fatal. It leads to the state being able to run mechanistically; reliant on state structures.’ According to Dyzenhaus, Schmitt is of the view that Hobbes’ distinction between inner and outer ultimately causes the state to become soulless and hollow. The danger, for Schmitt, arises when inner gains primacy over outer.

⁶⁷⁶ *Supra*: Schmitt *The Leviathan*, 58.

⁶⁷⁷ *Ibid.*: 61.

an enshrined catalogue of human rights.⁶⁷⁸ For Schmitt, this embodiment of Kelsenian positivism transforms the sovereign into the mere personification of a legal order. What this facilitates is the ascendancy of ‘*indirect forces*’ in the form of ‘*modern political parties, trade unions and social organisations*’.⁶⁷⁹ In turn, these ‘forces of society’ engender a culture characterised by ‘*a system of checks and controls of state and government*’ that is neither a ‘*theory of state nor a basic political theory*’.⁶⁸⁰ Indicative of this type of regime is the ‘*doctrine of the separation and balance of power*’ that Schmitt manifestly deplures:⁶⁸¹

‘Giving individual rights to subjects is destructive to the integrity of the state. It culminates in the state of nature where all are not equal in the right to kill and be killed. It would produce an entity with the subjectivity of the state of nature and the objectivity of the sovereign state.’⁶⁸²

No longer viable here is a concept of the state founded on the sovereignty of ‘men’. In contrast, the state is ‘*perceived as a mechanism and a machine*’.⁶⁸³ To Schmitt, this is an enterprise lamentably underpinned by the efforts of those, such as Kelsen, purportedly motivated by a ‘*utopian desire to replace the government of men with the administration of things*’.⁶⁸⁴ Where individual rights attain primacy over ‘*the whole field of political contention*’, the problems of legitimate authority the political engenders supposedly wither away.⁶⁸⁵ This is repugnant to Schmitt. For him, recognition of individual rights connotes loss of the political and all hope of legitimacy. Life necessarily loses all meaning within the consequentially depoliticised and etiolated existence. The state becomes nothing more than a mechanistic entity, ‘*an agnostic state*’,⁶⁸⁶ dead and hollow from within.⁶⁸⁷ In essence, it is this nadir in the political life

⁶⁷⁸ *Supra*: Schmitt *The Leviathan*, 86: Schmitt makes it clear that he attributes no direct responsibility to Hobbes for the emergence of individual rights capable of assertion against the state. He hails Hobbes as ‘a true champion, who destroyed the murky distinctions of indirect powers’.

⁶⁷⁹ *Ibid*: 73: ‘The indirect forces seized the legislative arm of parliament and the law state and thought that they had placed the leviathan in harness. Their ascendancy was facilitated by a constitutional system that enshrined a catalogue of individual rights’; also *ibid*: 83: ‘Although Hobbes defended the national unity of spiritual and secular power, he opened the door for a contrast to emerge because of religious reservation regarding private belief and thus paved the way for new, more dangerous kinds and forms of indirect powers’.

⁶⁸⁰ *Supra*: Schmitt *The Concept of the Political*, 61.

⁶⁸¹ *Ibid*.

⁶⁸² *Supra*: Mc.Cormick ‘Fear, Technology and the State’, 619-652.

⁶⁸³ *Supra*: Schmitt *The Leviathan*, 65.

⁶⁸⁴ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 46

⁶⁸⁵ *Ibid*: 46.

⁶⁸⁶ Carl Schmitt ‘State Ethics and the Pluralist State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 303.

⁶⁸⁷ See *supra*: Schwab *Foreword and Introduction to The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, xxi; Schwab explains that Schmitt hoped to ‘turn

of the nation that signifies the ultimate ‘triumph’ of the rule of law type state. Predicated on a legal-constitutional system stripped of substantive content and consigned to wallow in a legalistic morass of value-neutrality, the *Rechtsstaat* holds sway.⁶⁸⁸ The very antithesis of the conflictual condition that Schmitt promotes, it is fertile ground for the social pluralism that he abhors. Primacy of individual rights conflated with the decline in the political life of the state inflames Schmitt’s ubiquitous polemic against the liberal bourgeois state. It also presages its fruition in his fully-fledged evisceration of liberalism and the positivist system upon which it rests:⁶⁸⁹

‘Because the state of the absolute prince was bound by virtue of law and transformed from a power and police state into ‘a constitutional state’ (*Rechtsstaat*), law too changed and became a technical means to tame the *Leviathan*. It became a technical instrument to make calculable the administration of state power.’⁶⁹⁰

However, does Schmitt detect a still more insidious element within Hobbesian theory; one destined to obliterate the decision-making facility of the state?⁶⁹¹ Here, the putative right of self-preservation is at centre stage.⁶⁹² To Hobbes, ‘*the securing of life is the ultimate basis*’ upon which the state rests.⁶⁹³ It is this specific rationalisation of the foundation for the legal order that precludes the state from demanding the sacrifice of

back the clock and eliminate the gaps in Hobbes’s theory’. However, he controversially claims that the 1938 Schmitt was closer to Weimar individualist or an authoritarian form of bourgeois liberalism than Nazi communitarian; more praising of Hobbes as the father of a strong liberal state than as one who formulated a justification for the emergence of a Hitlerian one-party state.

⁶⁸⁸ *Supra*: Weiler *From Absolutism to Totalitarianism*, 67: ‘The point that Schmitt emphasizes here is the conceptual-historical connection between freedom of conscience and the liberal-constitutional system’; *supra*: Schmitt *The Leviathan*, 42: ‘The machine, as of all technology, is independent of every political goal and conviction and assumes a value-and-truth neutrality of a technical instrument’.

⁶⁸⁹ This appears in *supra*: Schmitt *Legality and Legitimacy* and is discussed *infra* this Chapter.

⁶⁹⁰ *Supra*: Schmitt *The Leviathan*, 65; see also *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 90, drawing upon Schmitt’s observations in his *Constitutional Theory*, to the effect that the *Rechtsstaat* was in its autumn: ‘Realisation of the liberal programme, if it had won in 1848, would have been a brilliant victory. In 1919, as it fell without a struggle into our lap as the harvest of collapse, it came too late.’ Schmitt goes on to express his concern at the lack of enthusiasm; the feeling of emptiness that is felt towards the Constitution; see also Carl Schmitt ‘The Liberal Rule of Law’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 295.

⁶⁹¹ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 216; Balakrishnan indicates what he deems an almost unbelievable omission on Schmitt’s part: ‘He simply failed to point out that Hobbes had put a much more radical natural law qualification on sovereignty than the one involving religious uniformity’.

⁶⁹² Schmitt refutes the individual’s right of self-preservation but never acknowledges that Hobbes does not do likewise; on this point see John P. Mc.Cormick *Introduction to Legality and Legitimacy* by Carl Schmitt (Durham and London: Duke University Press, 2004) trans. and ed. Jeffrey Seitzer from *Legalität und Legitimität*, 1932 (Munich and Leipzig: Duncker & Humblot, 1932), xxiii. Mc. Cormick posits that on Schmitt’s interpretation, consent in Hobbesian terms means that there should be no right of resistance. Therefore, men must not only actively consent but not passively resist.

⁶⁹³ *Supra*: Strauss *Notes*, 91.

life.⁶⁹⁴ Courage is not, in itself, a virtue, and the subject is, therefore, ‘*under no obligation to risk his own life; for death is the greatest evil*’.⁶⁹⁵ Interwoven with this unequivocal recognition of the inalienable right to life, is the individual’s claim to ‘*take precedence over the state and determine its purpose and limits*’.⁶⁹⁶ How does Schmitt receive the potentiality of an entitlement that is liable to undermine the supreme dominion of sovereign decision: the quintessence of state integrity? For him, no such privilege exists. What Schmitt finds thoroughly objectionable is the notion that individuals should retain, acquire or accumulate *any* rights against the sovereign entity, even at the most fundamental level of self-preservation. This encourages a sense of self, wholly at variance with the overriding need to safeguard the state. A contrary ideology that attributes higher value to the individual than to the survival of the political entity is necessarily flawed:

‘In case of need, the political entity must demand the sacrifice of life. Such a demand is in no way justifiable by the individualism of liberal thought. No consistent individualism can entrust to someone other than the individual himself the right to dispose of the physical life of the individual.For the individual as such there is no enemy with which he must enter into the life and death struggle if he personally does not want to do so. To compel him to fight against his will is, from the viewpoint of the private individual, lack of freedom and repression.’⁶⁹⁷

Rarely does Schmitt state his intentions with such clarity. To attain a pinnacle of constitutionally unconstrained power, the state must be ‘*elevated above all other organisations and associations*’ and have a ‘*claim on the physical life of its constituents*’.⁶⁹⁸ Because repudiation of the autonomous human right to self-preservation is crucial to the perpetuation of the state, the sanctity of individual existence becomes dispensable:

‘The state, as the decisive political entity, possesses an enormous political power; the possibility of waging war and thereby publicly disposing of men’s lives. The *ius belli* implies such a disposition. It implies a double possibility: the right to demand of its citizens the readiness to die and to unhesitatingly to kill enemies.’⁶⁹⁹

⁶⁹⁴ *Supra*: Strauss *Notes*, 91.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Supra*: Schmitt *The Concept of the Political*, 72; see also *supra*: Schwab *The Challenge of the Exception*, 145: ‘For Schmitt, only the state can demand of its citizens the right to die. The task of the sovereign is to preserve order, peace and stability. If danger is posed to the state, sovereign power is almost limitless’.

⁶⁹⁸ *Supra*: Schwab *Introduction to Political Theology: Four Chapters on the Concept of Sovereignty*, xxiv.

⁶⁹⁹ *Supra*: Schmitt *The Concept of the Political*, 46.

This much is clear. Because human rights necessarily infringe the state's capacity to survive, it is the primacy of the state Schmitt strives to safeguard at the expense of what he considers the non-existent or wholly expendable rights of the individual.⁷⁰⁰ However, does not the *Rechtsstaat* seek, at least in part, to institutionalise those individual rights that Schmitt finds abhorrent but which, in contrast, it deems valid and inalienable as 'prior to and superior to the state'?⁷⁰¹ Indeed, Part II of the Reich Constitution is awash with putative Basic Rights that attract protected status as 'given prior to the state'.⁷⁰² At first glance, this appears an insuperable obstacle to his quest to eradicate social pluralism and the concomitant threat to sovereign decision. But paradoxically, it is within the homeland of individual rights, the Constitution itself, where Schmitt's subjugation of the individual is able to find concrete expression. For within Article 48 resides the authority of the president to suspend seven of the most fundamental individual rights known to humankind.⁷⁰³ From this manifest disparity between those sections of the Constitution indicative of the typical *Rechtsstaat* and the executive-centred Article 48, Schmitt derives precisely what he seems to crave. Lionisation of presidential power serves to fortify his polemic against the spurious recognition the liberal bourgeois state accords the individual. No vapid adherence to the vaunted rights of the individual must encroach upon the capacity of the executive to deal forcefully and decisively with impending peril. The sanctity of the sovereign decision alone is unimpeachable. This, in Schmitt's view, justifies an interpretation of Article 48 wherein

⁷⁰⁰ On this point, see Gabriella Slomp 'Thomas Hobbes, Carl Schmitt and the Event of Conscription', *TELOS* No. 147, (Summer 2009), 149, 163: 'Although the state is, according to Hobbes, entitled to make such requests [that the individual go to war]. Hobbes also allows the individual to deliberate privately on whether or not obedience ought to be withdrawn. If an emergency decision made by the *Leviathan* may in principle be overturned by an emergency decision made by the individual, it follows that in Hobbes' theory the individual and not the *Leviathan* is sovereign because "Sovereign is he who decides on the exception". By concentrating our attention on the event of conscription, it emerges that the distance between Hobbes and Schmitt could not be wider. To begin with, Schmitt does not allow for the notion of private emergencies in his concept of the political: all emergencies are public...Put simply, whereas the basic building block of Hobbes; construction is the individual, in Schmitt's theory, this role is filled by the group...When Schmitt states that "genuine protection is what the state is all about", he has in mind the protection of the whole people, not the protection of individual members of such a grouping'

⁷⁰¹ *Supra*: Schmitt *Constitutional Theory*, 202.

⁷⁰² *Ibid*: the basic rights that Schmitt comments fall into this category include freedom of religion, personal freedom, property and the right of freedom of expression. He also identifies the individual's *right of resistance* as the most extreme instrument of protection of these rights – not only inalienable but un-organisable.

⁷⁰³ The seven rights which are capable of suspension under Article 48 are as follows. Article 109: inviolability of personal freedom; Article 114: inviolability of the home; Article 115: privacy of mail, telegraph and telephone; Article 117: freedom of opinion and the press; Article 123: freedom of assembly; Article 124: freedom of association; Article 153: inviolability of private property.

the President is able to suspend, virtually at will and for potentially indefinite duration, such individual rights the Reich Constitution provisionally acknowledges.

Deployment of Article 48 authority to negate the parcel of postulated constitutional individual rights is, accordingly, crucial. Menace posed to the integrity of the state justifies a *constitutionally lawful* suspension of those ‘rights’ specifically enumerated in Article 48. But what consequences flow from any putatively *unlawful* abnegation of individual rights? Where the president exceeds the remit of the authority Article 48 confers – perhaps in reliance upon the wide interpretation that Schmitt commends - does this accord the citizen redress against the state? If an individual enjoys *a priori* ‘rights’ doctrinally located in the natural law tradition, an appropriate challenge surely lies against the state to dispute their violation. Equally, this entitles the citizen to seek restitution for breach of such constitutional rights, unlawfully denied him. It is here, however, that Schmitt wields his masterstroke. Because the political is preceded only by normative nothingness, *no* pre-political residuum of human rights exists to which individuals may have recourse. Not only does Schmitt advocate the indeterminate suspension of such positive norms within the Constitution that seek to bestow or acknowledge the validity of individual rights. With devastating simplicity, he augments this with the abnegation of their equivalent in the state of nature. In this, he invokes a suspiciously distorted account of Hobbesian theory; one that erases all traces of Hobbes’ residual adherence to the precepts of natural law. On this reading, no law exists distinct from that the sovereign entity ordains. Strangely reminiscent of the legal positivism Schmitt professes to condemn, whatever the state dictates *is* ‘law’.⁷⁰⁴ Irrespective of the degree of disaffection a subject may feel towards the state, no avenue of appeal inures:

‘Hobbes’ leviathan, a combination of god and man, animal and machine, is the mortal god who brings to man peace and security. Because of this – and not on account of the “divine right of kings”, his leviathan demands unconditional obedience. There exists no right of resistance to him, neither by invoking a higher nor a different right, nor by invoking religious reasons and rewards.’⁷⁰⁵

⁷⁰⁴ Hermann Heller ‘The Essence and Structure of the State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 269: ‘It was Kant who absolutised the validity of positive law and denied any right of resistance which, by the way, contradicted his own rationalist presuppositions about the law of reason. Since that time, the positivism of the continental theory of the state has not in any way recognised a right of resistance and has ultimately made a complete sacrifice of legality to legal certainty’.

⁷⁰⁵ *Supra*: Schmitt *The Leviathan*, 53.

If Article 48 complements Schmitt's invective against the rights of the individual, what does this herald for the right of equality enshrined within Article 109 of the Constitution: '*All Germans are equal before the law*'? How does this intermesh with his repudiation of individual rights and his conceptualisation of a supposedly homogenous unitary 'people'? The notion of equal access and reception to and by the law is, Schmitt asserts, immanent to the *Rechtsstaat* concept of law.⁷⁰⁶ Because law is conceived as that which confers an intrinsic right to equal treatment before it, the legal-constitutional state must necessarily reject the *ad hoc* command; the decision that '*in terms of content, is entirely determined by the individual circumstances of the single case*'.⁷⁰⁷ Within the 'rule of law' type state no equality, as conceived within the parameters the *Reichsstaat* implicitly ordains, may properly exist in the absence of the universally applicable *general norm*. But, conversely, the Reich Constitution expressly empowers the President to issue dictates to address such exigencies as arise from each concrete situation. The quest for equality, resting as it does on the general norm is, therefore, *prima facie* inconsistent with the emergency powers that Article 48 confers. To the extent that the *Rechtsstaat* admits the possibility of an exceptional situation, the exercise of extemporised executive power manifestly contradicts the guarantee of equality contained within Article 109.

Because unequivocal respect for equality does not sit easily with the wide-scale emergency powers upon which Schmitt asserts Article 48 is predicated, the constitution arguably undermines its own commitment to the even-handed application of 'justice'. In Schmitt's hands, this is a discrepancy ripe for exploitation. It furnishes proof that as a real-life concept, the *Rechtsstaat* is untenable. Inevitably, concessions are required to the demands of the 'political'. Is not a more realistic and candid approach, therefore, preferable? To jettison the attempts of the *Rechtsstaat* to erect a façade of equality that propagates invidious complaints against the state. Rather to openly cede unfettered decision-making capacity to the state in the 'exception', without specious deferment to the fallacious and ungrounded claims of the individual.

⁷⁰⁶ See *supra*: Scheuerman *The End of Law*, 228: 'Schmitt is not only dismissive of even minimal ideas of basic human equality (deriving in part from the intellectual legacy of Christianity) but also delights in the exercise of brute power in a moment inconsistent with even the most authoritarian strands of Christian thought'.

⁷⁰⁷ *Supra*: Schmitt *Constitutional Theory*, 194.

Nor does Schmitt confine his onslaught upon the *Rechtsstaat* to what he deems its immanent inconsistency within the *exceptional* situation. Aspects of governance within a state of normalcy similarly contrive to reinforce Schmitt's polemic against the idealised perfection of the 'rule of law' type state. In short, the Weimar Republic is not always true to its own constitutional ordinance of equality. To Schmitt, expropriation of formerly monarchical property to accommodate the social-engineering objectives of non-conservative members of the *Reichstag* betrays the hypocrisy of the *Rechtsstaat*.⁷⁰⁸ Equality before the law is an empty pledge if the legislature freely targets certain sections of society to afford a spurious benefit to others. The *Rechtsstaat* is therefore, in Schmitt's view, unacceptably selective as to the concrete deployment of Article 109.⁷⁰⁹ Equality before the law 'is reduced to the absurd demand to "apply unjust laws justly"'.⁷¹⁰ If statutes are discriminatory and inequitable, this produces nothing other than legislative absolutism. Yet, utilisation of situation-specific legislation is necessarily tailored to the political exigencies of the moment. Does not this pejorative stance, therefore, clash with the overall tenor of Schmitt's thought? Would, perhaps, his concern have been less stridently vocalised had this legislative action been of a more conservatively-oriented nature, geared to the preservation and not the confiscation of wealth?⁷¹¹ If, therefore, the agencies of the *Rechtsstaat* are 'guilty' of duplicity, then arguably so is Schmitt.⁷¹²

Such inconsistencies aside, Schmitt assails the Article 109 commitment to equality as one more unwanted encroachment upon the unassailability of the sovereign decision. Immanently incompatible with Article 48 and flaunted at will, 'equality' as understood

⁷⁰⁸ See *supra*: Schmitt *Constitutional Theory*, 191.

⁷⁰⁹ See *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 104-105: Schmitt condemns the expropriation laws enacted by the Reichstag as a violation of the equality provision contained in Article 109. According to the precepts of the *Rechtsstaat*, laws should be directed against everyone, not specifically targeted groups. This is, in Schmitt's view, an example of unacceptable parliamentary absolutism; this also links with his criticism of the secret ballot system intrinsic to the liberal-parliamentary system. On this point, see *infra*: this Chapter.

⁷¹⁰ *Supra*: Scheuerman *The End of Law*, 63.

⁷¹¹ See *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 185: Taken one step further, Muller argues that, for Schmitt, 'once the rule of law had ceased to protect private property, it would be sacrificed for a regime characterised by a permanent state of exception'. In this way, Muller posits that governance would then take the form of 'an executive, no longer democratically controlled; an executive that would rule by measures and make use of de-formalised law to preserve a "free society"', that is, a capitalist society guaranteed by a strong state'.

⁷¹² *Supra*: Scheuerman *The End of Law*, 211: 'Schmitt thinks he can categorise the left's attempts to expropriate royal property as an individual measure and thus demonstrate its ominous implications'; Scheuerman states that Schmitt deems this an act of 'revolutionary violence' but that Schmitt's reliance here upon 'elements of the liberal Rule of Law is purely strategic'.

within the liberal bourgeois state, is unsustainable. Far preferable, therefore, to re-define equality than to adhere to a conceptualisation of it observed in the breach rather than the performance. For Schmitt, equality is not an eternal value but a substantive concept.⁷¹³ Concrete and real, it depends upon a similarity amongst human beings, one with another.⁷¹⁴ Provided this factual correspondence exists, the subjects of the state become ‘equal’ and, as such, are at one with the *demos*.⁷¹⁵ But no parallel arises between pre-political individual rights and those ‘rights’, if any, intrinsic to Schmitt’s re-interpretation of equality. Wholly distinct from ‘*individualistic guarantees of the individual sphere of liberty*’, this last is purely a ‘*prerequisite for all additional other equalities*’.⁷¹⁶ These include the right to hold elected office, to vote, to have access to employment and imposition of the duty to undertake military service.⁷¹⁷ In short, Schmitt confines equality to various forms of civic responsibility.⁷¹⁸ Again, the integrity of the regimented collectivist community transcends the insipidity of the individual citizen. Closely intertwined with his democratic concept of law, Schmitt explicitly concedes that equality does not confer rights but instead comprises an instrument of synchronous subjugation to a sovereign will. In the absence of any feasible limitations upon this *will*, emanating from democratic principles, ‘*injustices and even inequalities are possible. One could deny inequality only insofar as one understands equality in an absolute sense that all are subordinated to the will in the same way*’.⁷¹⁹

No more vivid example exists of the ultimately cavernous theoretical gulf between Hobbes and Schmitt. The one the presumably unwitting precursor of a liberal tradition, imbued with cognisance of contra-state individual rights; the other an explicit abjurer of individualism in its manifold guises. Why then does Schmitt not only obfuscate this

⁷¹³ See *supra*: Schwab *The Challenge of the Exception*, 20; Schwab alludes to Schmitt’s belief that if the concrete situation is to have meaning in itself, then eternal values, including equality, are non-existent. As will emerge, Schmitt instrumentalises his reconceptualisations, both of ‘equality’ and homogeneity, to underpin his notion of democracy. This is discussed *infra*: this Chapter.

⁷¹⁴ See *supra*: Schmitt *Constitutional Theory*, 259.

⁷¹⁵ See *supra*: Schmitt *Preface to the Second Edition of The Crisis of Parliamentary Democracy (1926)*, 10, ‘Universal and equal suffrage is only, quite reasonably, the consequence of a substantial equality within the circle of equals and does not exceed this equality’.

⁷¹⁶ *Supra*: Schmitt *Constitutional Theory*, 209.

⁷¹⁷ *Ibid*: 259.

⁷¹⁸ See *ibid*: 281, where Schmitt explicitly sets forth his understanding of the practical ramifications of Article 109. General equality before the law means the elimination and prohibition of all privileges in favour of or to the advantage of individual citizens, including equality of political status, equal universal compulsory military service, equal duty to voluntary activity, equal tax obligation and no limitations on eligibility for office.

⁷¹⁹ See *ibid*: 286.

disparity but claim correlation between their divergent theories?⁷²⁰ In antithesis to Hobbes' recognition of pre-political individual rights, he is unsurprisingly reluctant to embark upon close scrutiny of any natural law aspects embedded within his predecessor's legacy. At the same time, he manifestly admires Hobbes' authoritarian intentions - especially the potentiality of the reciprocal relationship between protection and obedience. As below, this prospective justification for untrammelled sovereign decision entices Schmitt to appropriate Hobbes' theory as his own. But, as with others to whom he professes adherence, he casuistically disregards any elements incompatible with his own specific agenda.⁷²¹

Integral to this process of radicalisation is the incremental emergence of Schmitt's proto-fascism. If this coincidentally enfeebles the legal-constitutional basis upon which the Weimar Republic rests, it is a price Schmitt is seemingly prepared to pay. Critical to the Schmittian skein is eradication - or preferably pre-emption - of a coruscating descent into the pluralistic fragility that the primacy of the individual invokes. Hence his polemic against the liberal state, epitomising as it does the invocation and espousal of individual rights against the state:

'Schmitt seems to view the Rule of Law as a somewhat fraudulent notion. He derides the claims of constitutionalism and urges a radically reductionist interpretation of the modern state, as an agency to issue laws and to call them laws.'⁷²²

Nothing, least of all some ill-conceived individualistic zeal, must encroach upon the unassailability of the sovereign entity and the sheer power of the autonomous decision. The extent to which this enduring quest to buttress sovereign authority intersects with his treatment of the individual is discussed below.

⁷²⁰ See Andrew Norris 'Carl Schmitt on friends, enemies and the political', available online: <http://plinks.ebosohost.com/ehost/delivery> (accessed 10.12.2006), 11, n.20; Norris comments that in his 1938 book (*Leviathan*), Schmitt claims repeatedly that Hobbes denies the citizen the right to resist against the state. But according to Norris, this is not true: 'Hobbes has to grant such a right in cases where the state directly threatens the individual's life, as the protection of life is a necessary (if not sufficient) condition of political legitimacy'.

⁷²¹ This is particularly relevant to Schmitt's selective appropriation of the so-called decisionist theories of Jean Bodin. Schmitt disregards Bodin's sublimation of his sovereign prince to the laws of God and Nature and to certain human laws common to all nations, but seizes upon the absolute and perpetual power of the prince who is neither bound by the laws of his predecessors nor by his own laws: Jean Bodin *Six Books of the Commonwealth*, trans. M.J.Tooley (Oxford, 1955), 25, 28.

⁷²² *Supra*: Weiler *From Absolutism to Totalitarianism*, 157.

The individual within Schmitt's re-formulation of the Hobbesian reciprocity between obedience and protection

Under scrutiny here is Schmitt's ostensible distortion of Hobbes' natural law justification for the state. What does his dismissal of pre-political individual rights augur for the fundamental Hobbesian reciprocity between protection and obedience? If the constitution purports to confer a bundle of seemingly impregnable safeguards against state persecution, is the state irrevocably bound? In short, do - or should - legal-constitutional norms require the state to protect all its subjects without exception? Or is it appropriate for the state to retain the discretion to exclude sectors of the populace from protection? In that event, what consequences flow from this brand of selective sanctuary and how does this impinge upon the retrospectivity debate? Finally, as the subsequent section explores, does Schmitt ultimately conceptualise the 'constitution' as an infinitely more malleable device, poised at the service of the sovereign dictator?

In essence, Hobbes predicates his state theory upon the duty of each subject to obey the state, contingent upon the state's correlative duty to protect.⁷²³ Because the compliance component manifestly buttresses the supreme authority of the sovereign, it harmonises precisely with Schmitt's previously articulated pre-occupation with sovereign power. But does Schmitt meticulously embrace Hobbes' correlate in a substantive sense or is it merely the *extrinsic* construct that he seeks to harness? If the latter, does the ensuing re-formulation produce a dangerously distorted facsimile of the original which it purports to replicate? A brief re-statement here of Hobbes' position may serve to expose what appear ostensible discrepancies between the two. In part, it also explicates Schmitt's crucial transition from conservative authoritarianism to an immeasurably more lethal mode of political thought.

⁷²³ A full discussion of the Hobbesian protection/obedience correlate appears *supra*: section 5.

Hobbesian obedience

Laws of Nature indisputably exist within Hobbes' universe, the most significant the seemingly absolute mandate to accord unswerving obedience to state-ordained positive laws. Pivotal, however, is the tension Hobbes creates by his concession that individual rights exist before the inauguration of the state. Though the majority are suspended in the momentous transition from the state of nature to Commonwealth, the right of self-preservation survives. The subject may well be supplicant to the state as long as the state is able to afford protection, but the natural entitlement of self-preservation endures.⁷²⁴ In short, Hobbes advocates the unambiguous interdependency of protection and obedience subject only to the right of each subject to resist in the face of an existential threat. This residual privilege tempers Man's duty to obey. It is ultimately Hobbes' underlying *natural law* rationalisation of the state that at once justifies this obligation *and* undermines it.

Hobbesian protection

As with the duty to obey, incursion of natural law doctrine impinges upon the correlative duty of the state to protect. Once again, this emanates from Hobbes' acknowledgment of a litany of rights that inure to the individual *a priori* the state. Subjects have no inducement to forgo such privileges if the state possesses the prerogative to preemptorily abrogate its pledged mantle of protection. Crucial, therefore, is the notion that the state will never *voluntarily* withdraw the sanctuary it guarantees as a *quid pro quo* for relinquishment of such rights as inhere within the state of nature. This construct retains its elemental cogency, as long as the integrity of the state remains intact. However, a state is not always immune from catastrophe. Calamities – including warfare or internal strife – invariably befall it. These may, in turn, preclude the exercise of the protective role entrusted to the state. What recourse, if any, is then available to the subject whose state has undergone this process of 'disintegration'? To preserve the logic of his system at this crucial point, Hobbes permits the resurrection of his panoply of 'natural rights'. This restoration serves to avail the bereft in the interregal limbo - if any - that arises between the demise of one legal order and the ascendancy of the next. But to what extent does Schmitt concur? Is it

⁷²⁴ See *supra*: section 5.

this pervasion of natural law doctrine into Hobbesian theory that signifies Schmitt's point of departure from his predecessor?

Schmittian obedience

Key to ultimately unlocking this conundrum is the previously elucidated purely instrumental role Schmitt seeks to accord the individual. Far from a human embodiment of myriad enforceable rights against the state, each subject becomes little more than a sporadically useful appendage in the service of an unassailable sovereign entity. It is this reductionist conceptualisation of the individual that Schmitt maximally exploits in his radicalisation of the Hobbesian correlate between protection and obedience.⁷²⁵ That Schmitt discerns the utility to state supremacy of this fundamental reciprocity emerges, with full force, as early as *CP*:

'No form of order, no reasonable legitimacy or legality can exist without protection and obedience. The *protego ergo obligo* is the *cogito ergo sum* of the state. A political theory which does not become systematically aware of this sentence remains an inadequate fragment. Hobbes designated this at the end of his English edition of 1651, 396) as the true purpose of his *Leviathan*, to instil in man once again the "mutual relation between Protection and Obedience"; human nature as well as divine right demands its inviolable observation.'⁷²⁶

This, Schmitt is content to appropriate without palpable modification. But it is quickly apparent that this purported affiliation does not bear close scrutiny. For, with rapier-like precision, Schmitt proceeds to undercut the quintessential rationale upon which Hobbes founds his correlate. How does this crucial move arise? As with Hobbes, Schmitt demands that subjects of the state are in thrall to sovereign authority. But against Hobbes, Schmitt neither seeks nor requires justification, whether quasi-moralistic or otherwise, for establishment of the sovereign state. This effectively liberates his ideology from any problematic allegiance to pre-political individual rights. Within this amoral perception of reality, human beings possess nothing of value to sacrifice on entry into civil society. This enables Schmitt to distort the individual's minimal right of resistance, so axial to the Hobbesian construct of the state:⁷²⁷

⁷²⁵ *Supra*: Ulmen *Introduction to Roman Catholicism and Political Form*, xxxii, n. 31: 'Schmitt also subscribes to Hobbes' dictum: *auctoritas non veritas facit legem*, which supposes that the sovereign, by his authority, can demand obedience in return for protection'.

⁷²⁶ *Supra*: Schmitt *The Concept of the Political*, 52.

⁷²⁷ *See supra*: Bobbio *Thomas Hobbes and the Natural Law Tradition*, 70: 'Hobbes accepts that in extreme cases, an individual has the right to resist commands (when his own life is threatened)'; also *supra*: Schmitt *On the Three Types of Juristic Thought*, 74: 'He [Hobbes] sets aside every right of resistance... and seeks to construct the civil order from the individual. From this perspective of order, he

‘Resistance as a “right” is in Hobbes’ absolute state in every respect identical to public law and as such is factually and legally nonsensical and absurd. ... Against the irresistible, overpowering leviathan “state”, which subjugates all “law” to its commands, there exists neither a discernible ‘stance’ nor a “resistance” (“Wider-Stand”). Such a state exists as a state, and in that case, it functions as an irresistible instrument of quietude, security and order and has all objective and all subjective rights on its side because, as the sole and highest lawgiver it makes all the laws or it does not exist and therefore cannot fulfil its function as the defender of peace, in which case the state has returned to a state of nature and the state as such ceases to exist.’⁷²⁸

The duty to obey is now unequivocal and unconditional. Neither commission nor omission on the part of the sovereign entity confers upon the subject the prerogative to demur, far less actively rebel. The state that Schmitt envisions thrives on categorical compliance, not on some ill-conceived susceptibility to individual self-preservation.

Schmitt’s incursion into the right to resist meshes too with his remorseless polemic against social pluralism. To reinforce undiluted sovereign authority, Schmitt insists that no confusion exist in relation to the institution that warrants submission. The state alone merits unqualified deference. For this reason, organised parties ‘*capable of according their members more protection than the state*’ encroach unacceptably upon it.⁷²⁹ Regrettably, the state becomes ‘*at best an annex of such parties*’.⁷³⁰ When the individual subject switches allegiance to the faction most equipped to afford protection - as inevitably occurs - the state is unable to withstand the consequential fragmentation of authority. A pluralistic theory of the state presents an immanent paradox for it culminates in the fatal demise of the very institution which it pervades.⁷³¹

‘If it is no longer the state but one or other social group that in and of itself determines this concrete normality of the individual’s situation – the concrete order in which the individual lives – then the state’s ethical demand for fidelity and loyalty also ceases.’⁷³²

If the subject does not know who to obey, the state withers and dies. Such is the duty of compliance: total and unalloyed. If obedience is unequivocal - as is transparently the case for Schmitt - how does the individual enforce the reciprocal duty of the state to

seeks to create from the *tabula rasa* an order and community, out of nothing’. It is clear here that Schmitt disregards Hobbes’ partial reliance on natural law but instead seeks to attribute to Hobbes a state founded purely on a prudential social covenant between individuals.

⁷²⁸ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 46.

⁷²⁹ *Supra*: Schmitt *The Concept of the Political*, 52.

⁷³⁰ *Ibid.*

⁷³¹ This comprises a significant element of Schmitt’s critique of liberalism, explored later in this chapter.

⁷³² Carl Schmitt ‘State Ethics and the Pluralist State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 304.

protect? In the final analysis, where every right of resistance is expunged, what recourse remains for the stricken individual whose state persecutes rather than protects? For, as Weiler observes, '*the ideas of remedy and redress qua rights are totally strange to Schmitt*'.⁷³³

'Schmitt defined the entire enterprise of constitutionalism in reference to this ambiguity (that is, the one which existed between the recognition of the primacy given by Hobbes to individual rights and the lack of effective institutional guarantees to enforce them against the sovereign power).'⁷³⁴

Because Hobbes circumvents this issue – through his presupposition that a viable state will *never* afford its subjects cause for grievance - this is one question he need not explicitly confront. In contrast, to what extent does lack of effective redress for the beleaguered individual suffuse Schmitt's own conceptualisation of the protection/obedience reciprocity?

⁷³³ *Supra*: Weiler *From Absolutism to Totalitarianism*, 157.

⁷³⁴ *Supra*: Seitzer 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis', 203-224.

Schmitt: protection or dominion?

Schmitt's treatment of the Hobbesian protection component witnesses the coalescence of manifold theoretical strands within his Weimar writings. Each thread augments the authoritarian backdrop to his strategic assault upon the correlative duty to protect. However, it is arguably the last five that Schmitt deems of especial utility here.

- **Fixation upon the concrete reality:** the state must possess sufficient flexibility to respond promptly and decisively to the exigencies of the moment
- **Potentiality of the 'exception':** the 'exception' is an inexorable feature of political life. It is vital, therefore, to eliminate all legal-constitutional constraints that tend to fetter the ability of the state to mount an immediate and effective response to the challenges posed by the emergency situation. Because a closed system of positively-given norms enacted in accordance with pre-fixed procedures strangles sovereign authority, a normativist regime (*a fortiori* one of the Kelsenian variety) is necessarily antithetical to the best interests of the state
- **The ubiquitous risk of conflict:** because the real possibility of bellicosity is ever-present, the state must be constantly poised to safeguard its own integrity in the face of an existential threat to its survival
- **Valorisation of sovereign power:** the sovereign entity must possess sole discretion to formulate policy and implement *ad hoc* measures to ensure the current stability and future security of the state⁷³⁵
- **Indivisibility of sovereign authority:** divided rule (separation of power) and intrusion of legal-constitutional constraints imposed upon the executive authority, unacceptably circumscribe the decision-making capacity of the sovereign
- **Establishment and maintenance of order:** disorder destabilises and imperils the state
- **Eradication of influences, whether intrinsic or external in provenance, which may endanger the integrity of the state:** without the clarity, immediacy and unassailability of the normatively-untrammelled sovereign decision, the state becomes overly-vulnerable to factors that threaten to undermine its essential coherency.
- **Preservation of 'the political':** the distinction between friend and enemy is pivotal to the functionality and indeed the very existence of the state. If the sovereign entity lacks the requisite authority to make this vital determination, the state itself is in jeopardy
- **Monopoly of decision vested in the sovereign entity to make the vital friend/enemy distinction:** without the feasibility of a sovereign decision on the friend/enemy dichotomy, the political is lost. This signifies the elevation of soulless, procedurally correct norms over the vibrancy of situational 'laws' more tailored to the demands of the concrete reality
- **Abhorrence of social pluralism:** if society penetrates the state, this inexorably creates a host of factional interest groups that compete with the sovereign for the right to dictate policy, to control the destiny of the state and to make the friend/enemy determination; no longer does the individual citizen know who or what to obey
- **Ostensible abnegation of any natural law foundation for the state:** the state originates against the backcloth of a deontological wilderness – a normative nothingness and, as such, rests upon the norm-less authority of a sovereign decision

⁷³⁵ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 45, 'Different opinions are useful and necessary in the legislature but not in the executive where especially in times of war and disturbance, action must be energetic; to this belongs a unity of decision'.

- **Repudiation of pre-political individual rights capable of assertion against the state:** individuals possess no residual natural law rights (not even the right to self-preservation) to which to have recourse in the face of state repression
- **Rejection of individualism in all its manifestations:** non-recognition (or non-existence) of individual rights facilitates the primacy of the sovereign entity over state subjects without fear of dissent or rebellion
- **The inherently dynamic and dangerous predisposition of humankind:** this necessitates the subjugation of the innately anarchic characteristics of humankind⁷³⁶
- **The significance attributed to homogeneity of the *demos* and substantive equality:** to restrict the chaos that would otherwise ensue from an ever-present risk of real, physical killing, the friend/enemy dichotomy is drawn between groups rather than individuals. Homogeneity holds the key to the requisite consequential repression of the individual

As seen, what is manifestly pre-eminent to Schmitt is decisive governance within the aegis of the sovereign state. Without this foremost capacity to dominate, dissension and strife invariably beset the state and cause its inevitable demise. In contrast, the self-professedly archetypal *Rechtstaat* of Weimar Germany exemplifies, for Schmitt, the type of emblematic blemish in liberal constitutionalism that warrants an automatic ‘*reach for his scalpel*’.⁷³⁷ Dominion, not deferment to a constitutionally-guaranteed catalogue of individual rights, is paramount. To achieve this model of state domination, Schmitt conflates his re-interpreted variant of the Hobbesian obedience component with artful negation of the state’s duty to protect. This entails a dual-pronged strategy. First, abjuration of pre-political individual rights with their inherent proclivity to fuel insurrection; next, insistence that the sovereign entity alone determine the content and remit of the positive law to obviate enshrinement of all contra-state legal constitutional safeguards liable to confer ultimately *unrealisable* expectations.⁷³⁸ If enacted, these would possess the capacity fatally to impair the capacity of ‘the state’ to protect its own

⁷³⁶ *Supra*: Strauss *Notes*, 100: ‘Man’s dangerousness, revealed as a need of dominion, can appropriately be understood only as moral baseness’.

⁷³⁷ *Supra*: Weiler *From Absolutism to Totalitarianism*, 149.

⁷³⁸ According to Heller, the rule of law state properly recognises the right of the individual to protect himself by legal means against the state, thereby generally obviating the need for any supra or extra-legal right of resistance. See Hermann Heller ‘The Essence and Structure of the State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 270: ‘In the state based on the rule of law, a right of resistance against legally defective state acts is, for the most part, superfluous because the subordinates and subjects who are thereby burdened are generally capable of protecting themselves against the state by legal means.’ This does, however, as Heller concedes leave unanswered the question of how an aggrieved subject resists when ‘it concerns a state act repugnant to ethics’ but against which the state recognises no legal right of resistance. As will emerge, Schmitt’s solution is to sublimate the subject’s right of redress entirely to the vagaries of the sovereign decision.

existence.⁷³⁹ Where state and individual collide, no contest remains. The state must endure.

Once the state undertakes the duty to protect *all* its citizens on penalty of dissolution, it presages its own destruction. Because nothing transcends the existential integrity of the sovereign state, any ‘pledge of protection’ that it provisionally extends is one the state cannot or dare not always fulfil. When default occurs – as is inescapable within the politically-charged concrete reality - the aggrieved subject invariably responds by invocation of pertinent legal-constitutional ‘rights’. The primary option that avails the state is rescission of the safeguards it misguidedly bestowed. If the state wishes to survive, complaints emanating from either this revocation of obligation or breach of the normatively-enshrined ‘promise to protect’ are doomed to fail. Precipitated by rejection of such grievances civil unrest ensues, and however transient the concomitant disorder, the equilibrium of the state is impaired. To Schmitt, this susceptibility to destabilisation is repugnant. Superficially palatable though Hobbes’ formulation may appear as a contrivance to exact obedience from state subjects, the duty to protect is simply too explosive to countenance. Why furnish the individual citizen with normatively-guaranteed rights to personal security and freedom that the aggrieved only too easily transmute into weapons with which to subvert the state?

Worse still, humans are anarchic beings innately predisposed to create mayhem. If unchecked, these tendencies culminate in rampant individualism with the potentiality to destroy the state. Uncompromising sovereign control is, accordingly, indispensable if the state is to endure:

‘To Schmitt, individualism would rival the power of the state and threaten to restore the state of nature. All because Schmitt saw Man as an incorrigibly dangerous being who needed to be ruled, not protected by the state’⁷⁴⁰

What emerges is a newly-conceived *unilateral* obligation to obey.⁷⁴¹ This attains fruition in Schmitt’s acclamation of a form of executive authority, unhampered by legal-

⁷³⁹ ‘The state’ here is used in the sense of the homogeneity of the nation, whose politically unified will is identified with and represented through the sovereign leader (the President of the Weimar Republic), consequent upon the acclamation of the people through referendum or other similar public voting procedure. This is discussed *infra*: this Chapter, in relation to Schmitt’s constitutional theory and democracy.

⁷⁴⁰ *Supra*: Mc.Cormick ‘Fear, Technology and the State’, 619-652.

constitutional constraints. Concentration of power within a sovereign dictator, conjoined with eradication of individual human rights. The utility to Schmitt of these insights are evident. Not only do they foreshadow his rapprochement with the Nazi regime but also provide theoretical elucidation of his empirically inspired mid-Weimar interpretation of Article 48. A perfect amalgam of unbridled presidential power and a potentially indeterminate suspension of constitutionally guaranteed rights: the poisonous chalice of sovereign dominion the ambiguous reward for consummate obedience.

Fundamental, to Schmitt, is that a state should not endanger its own structural cohesion. Institutionalisation of individual guarantees is, accordingly, an exercise in both futility and risk. But what if, despite this injunctive, the state proceeds to enshrine such safeguards within its constitutional framework? How is the state to fulfil these elective ‘obligations’ with minimal harm to its own integrity? Does the state retain a residual discretion to determine the precise extent of its duty to protect? In short, whom is the state mandated to cherish? *All* state subjects who are superbly obedient or merely selected sectors of the populace? This inquiry Hobbes implicitly locates at the nucleus of his theoretical construct of the Leviathan state. Provided citizens proffer external compliance, the state extends protection as long as the regime endures. Hobbes excludes no-one who obeys. Only with Schmitt, however, is the arguably totalitarian potential of this aspect of Hobbesian theory fully realised. For immanent to *his* concept of homogeneity lies the capacity to debar tranches of the population from the state’s protective corral.⁷⁴² Irrespective of conformity, Schmitt implicitly - and during the Nazi era expressly - empowers the state to discriminate against individuals incompatible with its subjectively-ordained notion of ‘sameness’.⁷⁴³ *‘National Socialism has the courage to treat the unequal unequally and to put into effect the necessary differentiations.’*⁷⁴⁴

⁷⁴¹ See *supra*: Weiler *From Absolutism to Totalitarianism*, 101: ‘People are meant to be obedient because if they are not, disorders in the state will follow. He is not much concerned with the question whether all and any order is really good for them’.

⁷⁴² This is not a criticism uniquely applicable to the type of theory propagated by Schmitt. Within the greatest of self-vaunted liberal democracies, sectors of the populace have been ousted from the protection of the state. The most profound example is, perhaps, the historical (and long since abolished) institutionalisation of slavery within the United States; this, in spite of the US Constitution, which purports to promote the life, liberty and pursuit of happiness of ‘the people’.

⁷⁴³ This was even admitted by the Nuremberg Defendant, Schacht, who was ultimately acquitted. On this point, see *supra*: Owen *Nuremberg: Evil on Trial*, 222 quoting extracts from Schacht’s examination-in-chief before the IMT, 2 May, 1946: ‘Hitler promised equal rights for all citizens but his adherents, regardless of their capabilities, enjoyed privileges before all other citizens. He promised to put Jews under the same protection that foreigners enjoyed, yet he deprived them of every protection’.

⁷⁴⁴ Carl Schmitt *Staat, Bewegung, Volk* (Hamburg, 1933), 32.

This evokes shades of the inequality of ‘unequals’ and the permissible, even obligatory, alienation of those adjudged to infringe the homogeneous whole:

‘Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires first homogeneity and second, if the need arises, the elimination or eradication of homogeneity...A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity.’⁷⁴⁵

For Hobbes, abnegation of the duty to protect the totality of its loyal citizenry - by a state *capable* of protection - disastrously undermines it. In contrast, Schmitt implies that the state endangers its quintessential quality of sovereign pre-eminence, whenever it deigns to accord protection to the utterly compliant *non-homogenous*. On this view, the integrity of the state depends on exclusion of the ‘unequal’ - be they few or many - and not on the provision of sanctuary to all.⁷⁴⁶ Not only does such a state endure but flourish! But is this not a formula for arbitrary selection of those deemed undeserving of protection? And does not the state survive at the dubious cost of the exile *within it* of docile human beings, whose only ‘sin’ is to be pronounced different? Schmitt would presumably rejoin that those who align with the state have no need of protection – other than from external peril – whilst inhabitants of every other category tacitly invite discrimination. On this analysis, the Hobbesian duty to protect becomes either otiose or unwarranted. Yet, does not Schmitt discount the ease with which residents slide from the first category into the second, purely at the volitional whim of the state? Just when subjects are at their most vulnerable, occurs the very moment at which the state has *carte blanche* to treat them as it will.

Whether Schmitt embraces or overlooks the potentiality for state despotism, embedded within his theoretical position, remains problematical. Less equivocal, perhaps, is his insidious corruption of the Hobbesian protection component. This effectively transforms Hobbes’ authoritarian formula for the state paradigm into abject subjugation of the individual.⁷⁴⁷ Integral to this formulation is legally-deregulated state authority; dominion stripped of legal-constitutional normative constraints and emancipated from the strictures of enforceable individual grievance. Buoyed by this construct during the

⁷⁴⁵ *Supra*: Schmitt *Preface to the Second Edition of The Crisis of Parliamentary Democracy* (1926), 9.

⁷⁴⁶ *Ibid*: 9; *ibid*: 10, ‘Equal rights make good sense where homogeneity exists’.

⁷⁴⁷ See *supra*: Weiler *From Absolutism to Totalitarianism*, 101: ‘Schmitt reformulated Hobbes on protection and obedience so that instead of reciprocity, there is the duty of one-sided submission by the subject’.

demise of the Weimar Republic and the inception of the Nazi regime, Schmitt ought perhaps to have appreciated the potential for repression vested in his new overlords. Instead of this, ‘Schmitt sought [later] to justify his collaboration with National Socialism by appealing to the Hobbesian standard of “obedience for protection”’.⁷⁴⁸ But as Mc.Cormick observes, is it credible that a political theorist of Schmitt’s intellect and perspicacity could truly believe that the Nazis would guarantee him the personal security he craved, even in exchange for unqualified allegiance? How could he simultaneously ‘theorise into oblivion the protection component of the [Hobbesian] protection/obedience formula’,⁷⁴⁹ and then expect the state to treat him as uniquely deserving of the type of protection arbitrarily denied to swathes of fellow Germans?⁷⁵⁰

On any retrospective appraisal, however dispassionate, Schmitt’s affiliation with the Nazis is manifestly indefensible. Indeed, his own belated attempt at self-exculpation is at best naïve and at worst cynically opportunistic.⁷⁵¹ Only, perhaps, from *his* contemporaneous perspective does his ostensible endorsement of the Nazi totalitarian juggernaut become remotely comprehensible. As Balakrishnan conjectures, is it the glittering allure of the political ‘oath’; the enthralling ‘myth’ of sovereign aggrandisement, rather than some nebulous prospect of sanctuary that so utterly bewitches Schmitt?

‘Schmitt did not decide to obey merely on the Hobbesian grounds that subjects owe obedience to the power which protects them. He went far beyond this, seeking to find a place at the heights of this political system. In the revised version of *Der Begriff des Politischen*, which came out in 1933, Schmitt emphasized the significance of the political oath as a vector of the totalisation of politics; the point at which it becomes an all-encompassing fate.’⁷⁵²

⁷⁴⁸ *Supra*: Mc.Cormick ‘Fear, Technology and the State’, 619-652.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ See *supra*: Wolin ‘Carl Schmitt, political existentialism and the total state’, 389-416, 416, n. 40 where Wolin refers, somewhat acerbically, to an observation in *supra*: Schwab *The Challenge of the Exception*, 106, cited with approval by Joseph Benedersky in ‘*The Expendable Kronjurist*’ 312: By opting for National Socialism, Schmitt merely transferred his allegiance to the newly constituted authority and this was not incompatible with his belief in the relationship between protection and obedience’.

⁷⁵¹ See *supra*: Schmitt *On the Three Types of Juristic Thought*, 109, n.45: ‘Ironically, perhaps, Schmitt would encounter difficulties with the Nazis over whether the Third Reich was a *Rechtsstaat*. He originally concluded that the Hitler regime, though a “just state”, could no longer be considered a *Rechtsstaat* in the traditional sense of the word. However, he soon adjusted his interpretation to accommodate the Nazi insistence that the new order was, indeed, a *Rechtsstaat*’.

⁷⁵² *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 178.

Fortified by this mantra of unquestioning obedience, Schmitt claws his way ever nearer to the unassailable sovereign dominion he envisions and with it, the ordered existence for which he appears to yearn.

Axiomatic to Schmitt, thus far, is the notion of obedience *without* protection. On the contrary, his *The State as Mechanism in Hobbes and Descartes* (1937) (*Mechanism*),⁷⁵³ witnesses a fleeting amelioration of this potentially draconian formulation. Here, he lauds ‘*the [Hobbesian] totality of state power*’ that ‘*always accords with total responsibility for protecting and securing the safety of its citizens*’.⁷⁵⁴ This ephemerally re-fashions an inextricable link between the ‘*renunciation of the right to resist as only the correlate of the true protection he [Hobbes] guarantees*’.⁷⁵⁵ Just the glimmer of a possibility begins to emerge that a compliant citizen may disobey where the state chooses to withhold protection. *During* the subsistence of the state (or regime), some tenuous capacity *not* to submit, in the face of state oppression, now seemingly exists. Nowhere, however, does Schmitt seek to justify this ‘entitlement’ by reliance upon the Hobbesian natural right to self-preservation. More plausibly, recourse rests purely within the need to mount an immediate, concrete response to a real, existential threat. But on this premise a menace to whom? Surprisingly, it is imminent imperilment to the *individual*, not the state that evokes concern. This is manifestly at variance both with Schmitt’s prior negation of the state’s duty to protect *and* his subjugation of the individual. But is his discrepant stance, nevertheless, contextually explicable?

In the face of Schmitt’s professed conformity to the Nazi regime, 1936 was to witness an alarming SS-instigated move against him. Though ultimately thwarted,⁷⁵⁶ this unsolicited reminder of his own fragility was, perhaps, instrumental in the formulation of his newly-articulated reticence about a wholly ‘one-sided’ duty of submission.⁷⁵⁷ Did he discern, at this point, that ingratiation to his fascist masters was no longer his

⁷⁵³ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*.

⁷⁵⁴ *Supra*: Schmitt *The State as Mechanism in Hobbes and Descartes*, 1937, 96.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ This occurred only through the timely intervention of Goering.

⁷⁵⁷ *Supra*: Schwab *Foreword and Introduction to The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, xvii: ‘Notwithstanding his general commitment to the new regime, Schmitt’s past began to weigh heavily on his situation. The SS Security Service’s (SD) dossier on Schmitt, including the parts dealing with the incriminating material that Waldemar Gurian, among others, disseminated from abroad, material that was used against Schmitt in the SS attacks in 1936, makes for breathless reading’.

passport to safety? If so, total correlation between obedience and protection was critical if Schmitt was to provide an effective, theoretical justification for his personal survival. Is it not also feasible that Schmitt recognised that breach of the social contract by the state and, with it, the possible diminution of the individual citizens's obligation to obey, would denude the state of its quintessential integrity? Without this, the state would forfeit its ability to attain credibility on the world stage as a legitimate entity, concomitant with which is the right of its citizens (within the umbrella of the state) not to be retrospectively criminalised by the actions of its political enemies? This possibly explains his apparent adherence, in *Mechanism*, to a more conventionally Hobbesian stance:

'It was only in the context of the rapidly emerging one party SS State that Schmitt fully understood and hence appreciated Hobbes' individualism, leading him to ridicule those who over the centuries regarded Hobbes as "the notorious representative of the absolute 'power state' " and interpreted the image of the Leviathan.....to be a horrible Golem or Moloch.'⁷⁵⁸

Yet, in his longer 1938 piece on Hobbes, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol (L)*,⁷⁵⁹ no hint remains of his insistence that the state must protect without exception. Here, Schmitt is content to reiterate without more the Hobbesian formula: '*if protection ceases, the state too ceases and every obligation to obey ceases*'.⁷⁶⁰ No unequivocal reassertion appears here of the essential correlate between protection and obedience in the manner postulated, just one year earlier, in *Mechanism*. Common to both is the affirmation that, '*the "relation between protection and obedience" is the cardinal point of Hobbes' construction of the state*'.⁷⁶¹ However, it is the ensuing segment incorporated in *Mechanism* but omitted in *L* that is so telling: '*All one-sided conceptions of totality are incompatible with this construct*'.⁷⁶² If Schmitt no longer demands perfect mutuality between obedience and

⁷⁵⁸ *Supra*: Schwab, *Foreword and Introduction to The Leviathan*, xix.

⁷⁵⁹ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 1938; see *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 106: 'Much of Schmitt's own work had been significantly influenced by Hobbes. Although on *On the Three Types of Juristic Thought*, Schmitt repudiated his earlier decisionism, he had not actually abandoned that thinker. After being rebuked by the Nazis in 1936, Schmitt, in fact, returned to Hobbes; for an insight into Schmitt's reading of Hobbes in the historical context of Nazi Germany, see, for example, *supra*: Schwab *Foreword and Introduction to The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*.

⁷⁶⁰ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 72.

⁷⁶¹ *Ibid*: 72 and Schmitt *The State as Mechanism in Hobbes and Descartes*, 1937, 96.

⁷⁶² *Ibid*: Schmitt *The State as Mechanism in Hobbes and Descartes*, 96.

protection – a tendency at least implicit within *L* - the state is seemingly at liberty to persecute its subjects with impunity, yet still survive intact.⁷⁶³

Unlike Hobbes, for whom the obligation to protect dissipates only with the involuntary demise of the viable state, Schmitt once more endows the sovereign entity with sole discretion whether or not to protect. Augmented by repudiation of pre-political ‘natural’ rights and the preclusion or selective deployment of positively-conferred guarantees, sovereign dominion appears complete. Deference to individualism is untenable. Conflated with fateful under-utilisation of the myth of obedience, it serves only to revive Schmitt’s Weimar nemesis. A mechanistic state, entirely reliant upon state structures and characterised by the alienation of personalistic sovereign will.⁷⁶⁴ One dominated by a closed system of norms that demands the right to be designated as ‘law’, just because enacted in a procedurally correct manner. Where the validity of the regime is, in part, predicated upon a legal-constitutional series of checks and balances that the individual is able to assert against the state. In short, the liberal state that Schmitt reviles.⁷⁶⁵

In the inherent determination of this type of state to privilege and placate the individual lie the seeds of its own downfall. Recognition and enforceability of individual rights robs the state of its defining qualities and reduces the sovereign to an amortised semblance of the majestic entity it once was. If individualism holds sway, the sovereign shrivels within the state and dies. What elicits Schmitt’s particular disdain is the mechanistic soullessness and technicity of the legal-positivist state. From his polemical perspective, it is the ‘rule of law’ state that is pejoratively cast as the mechanistic entity, hidebound by norms and wholly divorced from the concrete reality.⁷⁶⁶ This produces a regime more intent on the formality, predictability and strict legality of law than its

⁷⁶³ Controversially, perhaps, this view is not shared by Schmitt’s apologists, amongst them Schwab; see *supra*: Schwab *Foreword and Introduction to The Leviathan*, xxii: ‘It is true that Schmitt’s conception of the qualitative state obligated citizens to obey the legally constituted authority, but their obedience was predicated on their being provided with security by the state...Schmitt was not guilty of being a Hitlerian Nazi because he had no use for a polity that offered no protection.’ In essence, Schwab posits that Schmitt’s *Leviathan* is a veiled attempt to criticise the Nazi quantitative or totalitarian state; cf. *supra*: Weiler *From Absolutism to Totalitarianism*, 96.

⁷⁶⁴ See *supra*: Dyzenhaus ‘Now the Machine Runs itself’, 1-19.

⁷⁶⁵ Schmitt’s stance towards liberalism is further explored below.

⁷⁶⁶ See *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 39, where Mc. Cormick posits that to Schmitt, the technology of the positivist state entails domination not only of nature but of human beings as well. The bureaucracy intrinsic to the formal legality of the *Rechtsstaat* is itself an inanimate machine with the potential for human enslavement.

substantive content and legitimacy. Meticulous regulation of the law-making process attains unwarranted primacy over the state's freedom to act purposefully to rebuff or repress threats. The individual subverts the state and this, Schmitt cannot countenance. But by what criteria does Schmitt define *legitimacy*?⁷⁶⁷ Is not Schmitt's degradation of the individual a devastating inversion of the critique he seeks to level against the *Rechtsstaat*? For does not Schmitt relegate the individual to machine-like status and, in turn, elevate the sovereign decision - as instantiated through the administrative apparatus of the state - to a pulsating, vibrant entity that alone merits survival? Is it not now the individual who has but one function: an inconsequential cog in a vast control mechanism? What ultimately remains is a regime populated by legally-debased individuals with no intrinsic worth: right-less non-entities in the service of an authoritarian sovereign entity. Fulfilment of their ascribed state-ordained function their purpose and expendability their fate.⁷⁶⁸

In summary:

- Individuals are entirely bereft of any natural pre-state rights
- All inhabitants of a state have an unconditional duty to obey all ordinances of the state without exception
- During the subsistence of the state, the protection expected of the state is purely discretionary, not imperative
- It is deleterious to the integrity of the state to enshrine legal-constitutional guarantees of protection/individual rights
- This is avoidable, however, provided that the sovereign entity has absolute dominion over the content and remit of the positive law
- If the state, nonetheless, opts to institutionalise positively-given guarantees of protection/individual rights, it is incumbent upon the state to make a friend/enemy decision upon those deserving of 'freedom from persecution' (the homogeneous whole)
- Irrespective of individual compliance with state ordinances, the state is at liberty to treat the 'non-homogenous', in whatever manner it deems appropriate
- *In concreto*, the very existence of the state may depend either on *withdrawal* of protection from sectors of its populace or a decision *ab initio* not to extend protection to them
- When the state fails to protect, whether volitionally or otherwise, subjects have no redress, arising either from breach of positively-conferred legal constitutional safeguards (if such are misguidedly created), or in their absence, by recourse to putative pre-political 'rights' (the very existence of which Schmitt refutes)
- Though the Hobbesian duty to protect is defunct, the duty of the subject to obey remains categorical and undiminished
- The state endures even where it denies protection to its citizenry

⁷⁶⁷ How Schmitt deals with the issue of legitimacy is dealt with in the ensuing section.

⁷⁶⁸ This encapsulates the fate of millions of human beings during their Nazi-era exploitation.

Rare sporadic deviations aside is the extraordinary pervasiveness and longevity of this invective against individualistically-oriented restraints upon state authority.⁷⁶⁹ Indeed, 'at no point does Schmitt retract his lifelong view that individual rights against the state are dangers to it'.⁷⁷⁰ More than any other facet of their respective theoretical positions, this deeply-engrained antipathy to the rights of the individual contrives to distinguish Schmitt from Hobbes. This, the post-war Schmitt eventually comes to concede. Reflective of his atypically faithful, if expediently evanescent *Mechanism* appropriation of Hobbes, he now acknowledges - rather than distorts - Hobbes' pragmatic recognition of *a priori* natural rights. To this end, Schmitt defines Hobbes as 'the first systematic thinker of modern individualism'.⁷⁷¹ How Schmitt's abhorrence of the rights of the individual and Hobbes' limited cognisance of them, specifically influence their express or implicit theoretical stance towards the validity of retrospective criminal law, is yet fully to unfold.⁷⁷²

If it is the notion of the 'autonomous individual' that, in part, justifies an unconditional embargo upon the retrospective application of criminal law, is not Schmitt's abnegation of individual rights incompatible with a blanket repudiation of *ex post facto* sanctions?⁷⁷³ Is this not accentuated by a regime reliant upon *ad hoc* implementation of targeted situation-specific measures where it is no longer feasible for human beings to properly regulate their present and future conduct with any degree of confidence in the certainty, predictability and fidelity of legal rules? Within the reality that Schmitt comes to envision, do not his categories of substantive equality and homogeneity facilitate the selective - and potentially retrospective - deployment of punitive sanctions? For with a conceptualisation of equality, perceived as material rather than formal, equality appears to connote nothing more than unquestioning obeisance to one indivisible will;⁷⁷⁴

⁷⁶⁹ *Supra*: Carl Schmitt *On the Three Types of Juristic Thought*, 82: in this 1934 work, Schmitt speaks pejoratively of the 'liberal constitutional, power-separating, normativistic way of thinking of a bygone individualism'.

⁷⁷⁰ *Supra*: Weiler *From Absolutism to Totalitarianism*, 155.

⁷⁷¹ *Ibid*: 70.

⁷⁷² See *infra*: Chapter 5.

⁷⁷³ See *inter alia* Charles Sampford *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006); Jeremy Waldron 'Retroactive Law: How Dodgy was Duynhoven?' *Otago Law Review* Vol. 10, (2004), 8.

⁷⁷⁴ See Carl Schmitt 'The Liberal Rule of Law' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 294: 'The state based on the liberal rule of law is a *status mixtus* that purposely balances contrary principles in the interest not of political unity but of individual freedom. An absolute democracy destroys individual freedom no less than an absolute monarchy'.

individual liberty merely a debased entitlement to harmonise the atomised spirit with the dubious ethos of a uniformly-cohering polity.⁷⁷⁵ Rampant, here, is the heterodoxy Schmitt demonstrates in relation to the traditional tenets of classical natural law doctrine.

Unequivocal nullification of individualistically-oriented incursions into sovereign authority epitomises Schmitt's masterly subjugation of law and reason to power and politics. Thematically related to this abhorrence of normative constraints upon sovereign decision-making and, crucially intrinsic to his evolving legal and political philosophy, is the contradiction this generates between:

'A liberal individualism burdened by moral pathos and democratic sentiment governed essentially by political ideas. It is, in its depths, the inescapable contradiction of liberal individualism and democratic homogeneity.'⁷⁷⁶

It is with Schmitt's evident pre-occupation with the potentiality of democracy and the potency of the politically unified will of a homogeneous people - perceived as the antithesis of liberal individualism - that the ensuing section is primarily concerned.

⁷⁷⁵ See *supra*: Schmitt *Constitutional Theory*, 256 where Schmitt posits that freedom is a liberal principle, when meant in the sense of an individual freedom accorded every person by nature. This is in contrast with equality, seen by Schmitt, as a democratic principle.

⁷⁷⁶ *Supra*: Schmitt *Preface to the Second Edition of The Crisis of Parliamentary Democracy (1926)*, 17.

The ‘whence’: the will of the people and the democratic concept of law

‘Characteristic of Schmitt’s carefully crafted prose is an unremitting oscillation between the cold and the feverish; the academic and the prophetic; the analytical and the mythical. This spellbinding back and forth is the secret of his success. He can make even discussions of constitutional technicalities glow incandescently.’⁷⁷⁷

Revamping decisionism: is not the die yet cast?

Under scrutiny in this section is Schmitt’s utilisation of the ‘will of the people’ within a democratic framework to engineer a degree of originary validity for the sovereign decision and, in consequence, for the legal order itself. Integral, here, is the transition within his Weimar productions from explicit suspicion of plebiscitary will to its apparent embrace - harnessing of the ‘myth’ of the Volk to instigate, infuse and galvanise an entire constitutional order. Encompassed within this inquiry is his seeming repudiation of Hobbes’ social contract theory and the natural law foundation upon which it ostensibly rests. More far-reaching still is the potential he seeks to exact from the notion of homogeneous political unity in order to generate his ‘positive concept of the constitution’. To what extent does this culminate in the elevation of Article 48 presidential powers above what Schmitt discerns the ‘*relative and secondary norms*’, embodied within the written constitution in the form of mere ‘constitutional laws’?⁷⁷⁸ How does he instrumentalise the will of the people both to marry with and to intensify the charismatic ‘dictatorial’ role of the President? Finally, as the subsequent section demonstrates, in what sense is Schmitt’s notion of a dual strata of constitutional – or quasi constitutional - ordinances able to explicate and fuel his polemic against liberalism and the principle of ‘equal chance’ (Article 76), pivotal but paradoxically fatal to it?

⁷⁷⁷ *Supra*: Holmes *The Anatomy of Antiliberalism*, 39.

⁷⁷⁸ See *supra*: Schmitt *Constitutional Theory*, 78 where Schmitt explains that it is the ‘fundamental political decisions’ to which constitutional provisions are secondary.

The backdrop

In his early and mid-Weimar work, Schmitt manifestly focused on the imperative for a sovereign decision, produced by unassailable dictatorial authority within the transcendent ‘exception’. What mattered was that a decision impelled and sculpted by the friend/enemy antithesis, was capable of formulation and implementation. An act of *de facto* decision-making somehow elevated to impregnable *de jure* status, irrespective of substantive content or procedural niceties. But in the waning years of the 1920s, does this glorification of the normatively ungrounded and deformed exercise of sovereign *voluntas* - as the authenticating point of origin of an entire legal order – retain its allure? If not, and Schmitt also disputes the equation between his conception of legitimacy and the formal legality of the positivist system enshrined within the *Rechtsstaat*, what does suffice?⁷⁷⁹ Where legality is perceived as nothing more than the functional mode of modern industrial or state bureaucracy,⁷⁸⁰ this generates only a pale shadow of the legitimacy Schmitt purportedly craves in his quest for ‘*a formula of moral, ideological or philosophical identity and self-image of a political system*’.⁷⁸¹ But if the alleged technicity of the *Rechtsstaat* fails to capture this elusive legitimacy,⁷⁸² is an unvarnished

⁷⁷⁹ On this point, see *supra*: Seitzer *Introduction to Constitutional Theory*, 43, ‘Schmitt misses the essence of liberal constitutional law making. He focuses on the sovereign decision but not whether the resulting constitution protects individual liberty. This shifts the theoretical epicentre of the liberal constitutional tradition’; also *supra*: Wolin ‘Carl Schmitt, political existentialism and the total state’, 389-416 where Wolin posits that Schmitt commits a monumental *non sequitur* in historical reasoning in that Schmitt disregards the reliance of the democratic revolutions of the 18th century on their substructure of civil liberties (freedom of speech, press, assembly and so forth). To Wolin, unlike Schmitt, these are the ‘necessary concomitant and *raison d’etre*’ of the liberal democratic tradition; also *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 94: ‘To Schmitt, the establishment of a constitution is a process, revealing the meta-legal dimensions of a legal system, posing problems of political legitimacy, not formal legality’.

⁷⁸⁰ See *supra*: Hirst ‘Carl Schmitt’s Decisionism’, 15-27: ‘Schmitt hated the idea of a state subordinated to law and politics dominated by discussion. Liberalism is rendered impotent by rule-bound legalism and the idea that individuals enjoy legally guaranteed rights against the state (a sort of ‘private sphere’ immune from state control). The political is none of this – its essence is struggle’; also Ellen Kennedy ‘Carl Schmitt and the Frankfurt School’ *TELOS* No. 71 (Spring 1987), 37-66: ‘To Schmitt, the making of law and its application, interpretation and administration divide the democratic ideal from liberal reality. Legality and legitimacy are distinct, even contradictory. Liberalism is only possible during unpolitical interludes – political sunny weather. Because it is apolitical, it discusses whilst others decide to demolish it’.

⁷⁸¹ *Supra*: Schmitt ‘The Legal World Revolution’, 73-91.

⁷⁸² *Supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 128: ‘Liberalism’s way of coping with the exception and the effects of it is further technicization of the normal order in an attempt to dominate political nature in the same way that technology dominates material nature. What should be more than mere machine, the constitutional order is made increasingly so in avoiding the appropriate use of political technology, the dictatorship’.

decisionist state theory any more likely to instil and sustain categorical compliance from state subjects?⁷⁸³

Seemingly not, for in 1928, Schmitt seizes the singular opportunity presented by the comparative, if ephemeral, serenity of the Weimar Republic to wrest legitimacy from the jaws of irrationality; in essence, to seek ‘*to explain how a decision might be objectively justified*’.⁷⁸⁴ Here, in his *Constitutional Theory (1928) (CT)*,⁷⁸⁵ Schmitt attempts to consummate aspects of the journey which *The Crisis of Parliamentary Democracy (1923) (CPD)*⁷⁸⁶ prefigured. The pursuit of legitimacy comprised within them encapsulates his strategic manipulation of the democratic tradition and his concomitant denigration of liberalism. Locked thereafter in bitter conflict and jostling for supremacy within the abiding tension Schmitt generates is his conceptualisation of an ‘*anti-universalist homogeneous democracy*’, in juxtaposition with a ‘*normativistic liberal rule of law*’⁷⁸⁷ – the one embraced; the other ostensibly reviled.

As commonly understood, a democratic regime connotes a system in which all citizens are entitled to participate in political decision-making, whether indirectly through elected representatives or through direct participation in the governmental process. Neither necessarily synonymous nor co-extensive with the rule-of-law type state such democratic governance, especially in its direct manifestation is, perhaps, overly susceptible to selective manipulation.⁷⁸⁸ From a Schmittian-inspired ideological perspective, this is explored below. In comparison to democracy, liberalism is ‘*rule through general laws enacted via parliamentary due process, following consultation and applied in an objective and neutral manner, its decisions based wholly on and explicable by reference to the clearly defined contents of legal norms*’⁷⁸⁹ - in short, the

⁷⁸³ On the issue of justifying obedience to the state, see *supra*: Heller ‘Political Democracy and Social Homogeneity’, 256 and Carl Schmitt ‘State Ethics and the Pluralist State’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 300; in essence, Schmitt posits that legitimacy is founded upon obedience to personal authority rather than to a system of free-floating norms.

⁷⁸⁴ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 52.

⁷⁸⁵ *Supra*: Schmitt *Constitutional Theory*.

⁷⁸⁶ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*.

⁷⁸⁷ On this point, see *supra*: Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 255, n.55.

⁷⁸⁸ Indeed, it is this lack of direct correlation between direct democracy and indispensable facets of the traditional *Rechtsstaat* that Schmitt was later to exploit.

⁷⁸⁹ The author is indebted to Michael Salter for this definition; it is however, arguably possible to comply with the rule of law criteria without meeting the fundamental rights ideals of equality and justice. On this

Rechtsstaat model Schmitt appears to reject.⁷⁹⁰ What then, for Schmitt, is the intrinsic fascination, if any, of democracy? And does distortion of the democratic tradition enable him to dilute or gloss his prior trenchant decisionism and, thereby, to procure his own peculiar but still elusive brand of legitimacy? To unlock this conundrum firstly requires a brief foray into his early Weimar productions.

point, see for example Joseph Raz, *The Authority of Law*, (Oxford: Oxford University Press, 1979), 210-11: 'A non-democratic legal system based on the denial of human rights, on extensive poverty, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies'.

⁷⁹⁰ See *supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy*, xxxv: 'A republican constitution could find temporary legality but not permanent legitimacy'.

The early years: distrust of ‘the people’

The infancy of the Republic heralded Schmitt’s quest for what he deemed an authentic foundation for the sovereign state. Absent, however, during this period was any embryonic reconciliation between the quiescent or active force of the plebiscite and the untrammelled sovereign decision. The incipient power of the insurgent masses was a menace ripe for suppression rather than a medium for fortification of executive supremacy. This trend, evident in both *Die Diktatur* (1921)⁷⁹¹ and *Roman Catholicism and Political Form* (1923),⁷⁹² was at its height in *Political Theology* (1922).⁷⁹³ Here, Schmitt endorsed Donoso Cortes’ depiction of the masses as a ‘*vile and ungodly multitude*’.⁷⁹⁴ Though cognisant of the potency of demotic coherence, this was insufficient to surmount the disjunction Schmitt discerned between the imperative for unbridled sovereign discretion and the uncontrollable vagaries of the unified popular voice. Whether perceived as a source or repository of power, the *demos* was simply too volatile:

‘The necessity by which the people always will do what is right is not identical with the rightness that emanated from the commands of the personal sovereign. The unity that a people represent does not possess this decisionist character; it is an organic unity and with national consciousness, the ideas of the state originated as an organic whole.’⁷⁹⁵

Indispensable, to Schmitt, was the need for the sovereign will determinative of the exception, to bestride the state as a supra-normative force. Only when politics possessed the facility to surpass law was the state able to flourish and meet the demands of the concrete reality. On the contrary, democracy still invited distrust. Insistence on a spurious form of identity between rulers and ruled, transformed the foundational basis for the governmental regime from a transient promise of transcendence to a fatal descent into immanence. It was the attendant move to indirect democracy - as a by-product of pluralism - that fettered law-making *discretion* to an intolerable extent, as the sovereign entity was utterly subsumed within the legal constitutional system it spawned:

‘In the 19th century, everything became dominated by conceptions of immanence. All the identities that recur repeatedly in the political theory and jurisprudence of the 19th century rest

⁷⁹¹ *Supra*: ‘*Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Rechtsverfassung*’, published as an Appendix to *Die Diktatur* (1924 edition).

⁷⁹² *Supra*: Schmitt *Roman Catholicism and Political Form*.

⁷⁹³ *Supra*: Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*.

⁷⁹⁴ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 67.

⁷⁹⁵ *Supra*: Schmitt *Political Theology*, 48.

on such conceptions of immanence: the democratic thesis about the identity of the governed and the governing; the organised state theory and its identity of the state and the sovereign; the jurisprudence of Krabbe and its identification of the sovereign with positive law and finally Kelsen's theory of the identity of the state with the system of positive law.⁷⁹⁶

Reliance on the will of the people emerged as a device to smother sovereign authority, not enhance it. This subjection or accountability of *power to formal legality* rendered democracy untenable for Schmitt.⁷⁹⁷ Whether the *demos* was conceptualised as wholly immanent or with a vital capacity for transcendence was of little consequence. For in neither event had 'the people' become a viable legitimising entity within the legal order or as a catalysing foundation for it.⁷⁹⁸ Pure decisionism - the brute force of unbridled and autonomous sovereign decision – remained the only feasible option.

Yet, just one year later, in *The Crisis of Parliamentary Democracy (CPD)* (1923), the perspective Schmitt adopted towards the people's will within the democratic context underwent a perceptible shift. Here, he inveighed against what he considered liberalism's unfortunate corruption of what he newly deemed the *true* democratic concept of governance. What accounted for this perversion was '*the smudging of the line between two traditions*',⁷⁹⁹ at least partially distinct in orientation and ethos. This misguided conflation culminated in a misplaced attribution '*to democracy of identifiably liberal traits*' - especially the separation of powers doctrine – '*and to liberalism a democratic and majoritarian character*'.⁸⁰⁰ Whilst the purported alliance

⁷⁹⁶ *Supra*: Schmitt *Political Theology*, 63; this is indicative of Schmitt's already scurrilous polemic against liberalism. On this point see *ibid*: 20: 'The essence of liberalism is negotiation; the hope that a decisive bloody battle can be transformed into a parliamentary debate and permit the decision to be suspended in an everlasting discussion'.

⁷⁹⁷ Interestingly, at this stage, it is *democracy* that Schmitt deems responsible for the relativisation of politics to law. As his theoretical position shifts towards the selective embrace of tenets of the democratic tradition, it is *liberalism* that he critiques for rendering power subject to law; see *supra*: Salter 'Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's Critical Theory of Law', 161-194: 'The constitutional state is governed by the rule of law. Schmitt repudiates liberalism in a blanket sense. Liberal principles are dysfunctional – they can only be resolved by the eradication of liberal principles and elimination of constitutional accountability of law'.

⁷⁹⁸ *Supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 113: 'Both in *Die Diktatur* and in *Politische Theologie* he dismissed the people as a legitimate and fitting subject of sovereignty. He did not fully perceive that democracy and the notion that sustained it, namely popular sovereignty, diverged substantially from liberalism, the slayer of sovereignty'.

⁷⁹⁹ *Supra*: Gottfried *Carl Schmitt Politics and Theory*, 105.

⁸⁰⁰ *Ibid*: see also *supra*: Carl Schmitt, *The Crisis of Parliamentary Democracy*, 43 where Schmitt distinguishes between laws born of co-operation and the participation of a popular assembly (parliament using the parliamentary method) and commands based only on authority (of which Hobbes is reminiscent); he clearly decries the one and endorses the other.

between democracy and liberalism was misbegotten,⁸⁰¹ no such antithesis existed between democracy and dictatorship.⁸⁰² Provided ‘the people’ sustained a will to political unity, no splintering of its quintessential identity could occur.⁸⁰³ Intrinsic to Schmitt’s perception of genuine democracy this unified polity, and the political will it engendered, contrasted starkly with the system of pluralistic, party-based representation endemic within the liberal-democratic system.⁸⁰⁴ Though 19th century parliamentarism operated effectively as a bulwark against opponents of the bourgeoisie, both from above and below, the concept of the liberal-parliamentary state had now lost both purpose and validity.⁸⁰⁵ What was professedly the golden-age of parliament, epitomised by its principled stance against monarchical regimes had long since disintegrated.⁸⁰⁶ Contempt for the ‘*naivety of the proponents of liberal publicity and political discussion*’ induced Schmitt to depict the contemporary openness of parliamentary politics as an ‘*ineffectual and ultimately dangerous technique, devoid of moral content*’.⁸⁰⁷

⁸⁰¹ *Supra*: Samples ‘Review of The Crisis of Parliamentary Democracy’, 205-214.

⁸⁰² *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 32; *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 29: ‘By 1923, Schmitt had constructed the antithesis of liberalism and democracy which remained one of the axioms of his political thought. For Schmitt, democracy was a Caesarist plebiscitary dictatorship based on acclamation’.

⁸⁰³ *Supra*: Carl Schmitt *Constitutional Theory*, 264.

⁸⁰⁴ Mc.Cormick *Introduction to Legality and Legitimacy*, xxxii: ‘Schmitt insists that the will of a homogeneous people more closely approximates justice than that of some party in parliament’ According to Mc.Cormick, Schmitt’s rejection of pluralism and his advocacy of presidential power are ‘all chief hallmarks of fascism’.

⁸⁰⁵ *Supra*: Scheuerman *The End of Law*, 49: ‘Schmitt says in the 19th century, in some parts of Europe, parliamentary bodies were able to acquire authentic political characteristics positioned between hostile monarchical forces based in the executive branch and militant emerging workers’ movements; parliaments dominated by the educated middle class strata played a pivotal role in the political community’s friend/foe division’.

⁸⁰⁶ See *supra*: Schmitt *The Crisis of Parliamentary Democracy*, 24: ‘As its most important opponent, the monarchical principle disappeared, liberalism lost its substantive precision and shared the fate of every polemical concept’; also *supra*: Carl Schmitt *The Concept of the Political*, 61: ‘it remains self-evident that liberalism’s negation of the state and the political, its neutralisations, depoliticizations and declarations of freedom have a certain political meaning and in a concrete situation these are polemically directed against a specific state and its political power. But this is neither a political theory nor a political state. Liberalism has attempted to tie the political to the ethical and subjugate it to economics. It produced a doctrine of the separation and balance of power, that is, a system of checks and controls against the government. This cannot be characterised as either a theory of the state or a basic political principle’.

⁸⁰⁷ *Supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 182; see also *ibid*: Schmitt *The Crisis of Parliamentary Democracy*, 50: ‘The idea of the modern parliament, the demand for checks and the belief in openness and publicity were born in the struggle against the secret politics of absolute princes.....if in the actual circumstances of parliamentary business, openness and discussion have become an empty and trivial formality, then parliament has lost its previous foundation and meaning’; also *supra*: Dyzenhaus ‘Now the Machine Runs itself’, 1-19: ‘Submission to Parliament is not a genuine decision but a decision to avoid decisions. Liberalism is tainted by negotiation; hijacked by liberalism with its fatal individualism – bedevilled by mechanistic functioning, neutrality and indecision’; *supra*: Schwab *The Challenge of the Exception*, 64: ‘To Schmitt, the hallmarks of liberalism are public debate, separation of powers and enactment of laws resulting from free parliamentary discussion’.

‘Many norms of contemporary parliamentary law, above all provisions concerning the independence of representatives and the openness of sessions, functions as a result like a superfluous decoration, as though someone had painted a radiator of a modern central heating system with red flames in order to give the appearance of a blazing fire.’⁸⁰⁸

Clearly repugnant, therefore, to Schmitt was liberal parliamentarism. Insipidly reliant on freedom of speech, freedom of the press and freedom of discussion, liberalism perceived these self-vaunted bastions of liberty not only as ‘*useful and expedient but really life and death questions*’.⁸⁰⁹ Plagued with indecision, ‘*Parliament is a mere function of the eternal competition of opinions. In contrast to the truth, it means renouncing a definite result*’.⁸¹⁰ In contrast, a nascent affiliation with democratic principles, as elucidated in *CPD*, augured what Schmitt considered a more plausible foundation for a viable state. This notwithstanding, no fully-synthesized satisfactory democratic option yet emerged from his searing assault upon what he adjudged a once authentic model of liberalism, now rendered flawed and anachronistic by a maelstrom of societal and political influences.

Still pre-occupied with boundless sovereign authority, Schmitt predictably deemed heretical the proposition that the will of the people was capable of autonomous propagation. It was the will of the sovereign, not the corresponding dynamism of the populace that must exercise sole dominion. The gulf he discerned between the two remained unbridgeable. Acknowledgment of the force of plebiscitary ‘will’ was feasible only to the extent that it was seen as the product (if paradoxically also the author) of sovereign *voluntas*: ‘*only political power, which should come from the people’s will, can form the people’s will in the first place*’.⁸¹¹ This highlighted the critical anomaly that came to blight Schmitt’s later embrace of the unified plebiscitary will as a supposedly cogent foundational norm. For did not his collateral insistence upon a sovereign decision that transcended the people’s will, entail an implicit realisation - later obfuscated - of the ostensible circularity of logic in any argument that conversely sought to *derive* sovereign power from an *a priori* cohesive popular will. Moreover, was this not a formulation that required ‘the people’s will’ - according to Schmitt, mysteriously capable of coalescence in the normatively unconstrained pre-state

⁸⁰⁸ *Supra*: Schmitt *Preface to the Second Edition of The Crisis of Parliamentary Democracy*, 6.

⁸⁰⁹ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 36.

⁸¹⁰ *Ibid*: 35.

⁸¹¹ *Ibid*: 29 (author’s underlining).

condition⁸¹² - to comprise both subject and object of governmental authority: the constitutive and constituted agency; the unity that created the legal order, only to be regulated by it?⁸¹³

Toying with variants to the democratic form impelled Schmitt to draw a parallel between the will of the people as the source of all power and God as the ultimate point of origin. Neither of them Schmitt chose to embrace due to what he adjudged the propensity of each to permit '*various governmental forms and juristic consequences in political reality*'.⁸¹⁴ The popular will was simply too pliable in empirical terms to found an entire legal order of the type Schmitt envisaged. Its malleability rendered it overly susceptible to the interests of those forces directed '*towards the creation and shaping of it*'.⁸¹⁵ Though the '*enthusiastic masses*' clearly held fascination for Schmitt, as for Sorel, in their capacity both to engender '*political realism*',⁸¹⁶ and to evoke the '*great psychological and historical meaning of the myth*',⁸¹⁷ Schmitt resided at the critical moment. The trend towards proliferation of a pluralism of myths was too volatile for unqualified commendation.⁸¹⁸ With unformulated - or incomplete - strands within his theoretical skein, the 'will of the people' presented a surfeit of challenges, as yet only partially resolved.

Manifest, nonetheless, to the 1923 Schmitt was the superiority of democracy over its liberal counterpart. *Democracy* was unequivocally the modern political principle, in

⁸¹² See Erich Kaufman 'On the Problem of the People's Will' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 191: according to Kaufman, it is not feasible even for the *pouvoir constituant* (however conceived) to have the status of absolute sovereign since even it is bound to pre-existing fundamental principles, presumably born from natural law precepts.

⁸¹³ This is discussed further *infra* in the instant section

⁸¹⁴ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 31.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid*: 75; also *ibid*: 68 (implicitly endorsing Sorel): 'Its centre is a theory of myth that poses the starkest contradiction of absolute rationalism and dictatorship but at the same time, because it is a theory of direct active decision, it is an even more powerful contradiction to the relative rationalism of the whole complex that is grouped around conceptions such as 'balancing', 'public discussion' and 'parliamentarism....In the modern bourgeoisie, in a social class ruined by scepticism, relativism and parliamentarism, it is not to be found. The governmental form of this class is liberal democracy, a "demogogic plutocracy"....Only in myth can the criterion be found for deciding whether one nation has reached its historical moment'.

⁸¹⁷ *Ibid*: 73; also *ibid*: 76: 'The theory of myth is the powerful symptom of the relative rationalism of parliamentary thought'.

⁸¹⁸ Despite this reservation, he is still more dismissive of the characteristic elements of liberalism; discussion, bargaining and parliamentary proceedings, all of which appear to Schmitt a betrayal of myth

contrast to ‘*the cowardice of discursive liberalism*’⁸¹⁹ that violated ‘the political’.⁸²⁰ Unlike his earlier or contemporaneous output, *CPD* heralded Schmitt’s incipient fascination with the unexploited potentiality of the ‘national myth’ and the potency latent within it. What had emerged, in *PT*, as an identification of decisionism with the imperative to impose authoritarian restraint upon popular sovereignty now inversely lent itself to an unqualified adoption of the ‘people’s will’.⁸²¹ Here lay the seeds of Schmitt’s momentous theoretical shift from political theology to political mythology,⁸²² a developmental strand that was to attain its zenith in *Constitutional Theory (CT)* and his other late-Weimar and early Nazi-era writings:

‘Every genuine government represents the political unity of a people and not the people in its natural presence.’⁸²³

This transition was, however, destined to unleash an array of problematic consequences, not least of which was first the paradox inherent within it and second, the viability and preservation of limitless sovereign dominion over the febrile force of the popular will.⁸²⁴ To what extent, therefore, do these new-found obstacles influence Schmitt’s endeavour to locate the validity of the founding decision in the unity of the political will? And even if aspects of *CT* tend to signify a sporadic, though fleeting rapprochement with elements of liberal constitutionalism,⁸²⁵ does this harnessing of the ‘plebiscitary will’ represent a further fateful move towards irrationalism?⁸²⁶

⁸¹⁹ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 69.

⁸²⁰ *Supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology*, 187; *ibid*: Schmitt, *Crisis of Parliamentary Democracy*, 35: ‘Parliament is a mere function of the eternal competition of opinions. In contrast to the truth, it means renouncing a definite result’

⁸²¹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 194.

⁸²² *Ibid*: 67.

⁸²³ *Supra*: Schmitt *Constitutional Theory*, 24.

⁸²⁴ This in itself invites scrutiny into whether Schmitt perceives the people’s will as immanent and therefore, implicitly in need of curtailment or transcendent. It is this latter concept within Schmitt’s work that is so intriguing and far-reaching inasmuch as it dovetails with his ‘positive concept’ of the constitution and his consequential valorisation of presidential power. These are explored later in this section.

⁸²⁵ See *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 29: ‘In 1928, Schmitt published *Constitutional Theory*, his first and last sustained treatise on constitutional jurisprudence. This signalled his rapprochement with the principles of liberal democracy’; *supra*: Seitzer *Introduction to Constitutional Theory*, 34: ‘In most works from the Weimar period, Schmitt’s desire for a politically efficacious legal and political theory led him to portray liberal theory and practice as outdated at best. *Constitutional Theory* is quite different. His desire leads him not to attempt to discredit liberal constitutionalism so much as to transform it from the inside out’. Whether these claims by Muller and Seitzer are well-founded remains to be seen.

⁸²⁶ See *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology*, 301 where Mc.Cormick conjectures that it is not feasible to elevate myth over technology without results potentially far worse than those associated with liberal theory and practice.

1. A paradox too far: grasping the ‘people’s will’

The starting point for resolution of the first inquiry - the circularity intrinsic to the proposition Schmitt postulates - is dual-pronged. Considered later is the *chronological framework* within which his premise functions. Initially under examination, and inextricably linked to this temporal structure, is *homogeneity*, a concept already suffusing several strands of the various hypotheses Schmitt advances.

1 (i) Homogeneity invoked

As seen, Schmitt deploys homogeneity both to underpin his concept of ‘the political’ (by its enablement of enmity within manageable parameters) and, via material equality, to facilitate the repression of each individual constituent within the polity.⁸²⁷ Revisited here, this time in conjunction with his invocation of democratic principles, it is this pre-occupation with homogeneity that exacerbates Schmitt’s formulation. Not content with a Hobbesian conception of an assortment of heterogeneous individuals within the pre-state condition, each of them intent on self-preservation, Schmitt predicates legal legitimacy on the ‘will’ of a somehow ‘ready-made’, coherent, politically unified *homogenous* people. Only through this mysteriously pre-constituted will is it feasible both to ground political power *ab initio* and, subsequently, to sustain it.⁸²⁸ The one evokes telling questions about the instillation of legitimacy; the other, its preservation within an already subsisting regime. It is the latter of these that is first considered.

1 (i)(a) Homogeneity and immanence

Analysed as an immanent concept, the imperative for homogeneity is ostensibly consonant with the popular collective mandate that operates as the legitimising cornerstone of any democratic state model:⁸²⁹

‘Democratic thinking rests on the idea that everything inside the state involving activation of state power and government only occurs within the confines of the people’s substantial similarity to one another.’⁸³⁰

⁸²⁷ As will emerge *infra*: Chapter 4, Schmitt also utilises homogeneity in his stance towards the judiciary.

⁸²⁸ *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxxix: ‘Schmitt does not perceive this a priori status to be institutionally determinate but instead as a pre-institutional will’.

⁸²⁹ See *supra*: Heller ‘Political Democracy and Social Homogeneity’, 256: ‘Democracy is supposed to be a conscious process of the formation of political unity from bottom to top; all representation is supposed to remain legally dependent on the community’s will. The people, as plurality, is supposed consciously to form itself into the people as a unity’.

The more so, perhaps, where homogeneity is depicted as '*the unity of the nation: common speech, common historical fates, traditions and memories, common political goals and aspirations*'.⁸³¹ Not necessarily synonymous with exclusively ethnic characteristics or convergences of religion, homogeneity facilitates the formation - and expression - of the politically unified will of the people.⁸³² But how readily is this attainable?

'Ultimately, Schmitt said that homogeneity was like nothing else, being based on the open-ended idea that government is legitimate to the degree that its actions reflect the will of the people. Democracy raises problems of the identity of the demos, its boundaries, its homogeneity.'⁸³³

When homogeneity evaporates, so does any realistic prospect of unified will-formation. Anathema, therefore, to Schmitt is any institutional development likely to preclude or inhibit the primary homogenous essence he seeks. The instigation of parliamentarism within a liberal-constitutional framework explains why homogeneity is so '*elusive within the Republic*'.⁸³⁴ The status the *Reichstag* enjoys and the concomitant pluralism it engenders, educes the need to recognise the '*relativity of the attempt to achieve political unity of the people via parliament*'.⁸³⁵ Revival of homogeneity and, with it, the possibility of restoration of the people's unified political will, is long overdue in a system Schmitt condemns for '*running on idle*':⁸³⁶

'The democratic concept of law is a political, not a *Rechtsstaat* based concept of law. It stems from the power of the people and means that law is everything the people intends. There is no limitation on this will stemming from democratic principles.'⁸³⁷

⁸³⁰ *Supra*: Schmitt *Constitutional Theory*, 263, 'Democratic equality is essentially similarity, in particular, similarity among the people. The central concept of democracy is people and not humanity. If democracy is to be a political form at all, there is only a people's democracy and not that of humanity'.

⁸³¹ *Ibid*: 258; cf. *ibid*: 259: 'economic condition is not sufficient to ground substantial homogeneity.'⁸³¹

⁸³² See *supra*: Scheuerman *The End of Law* (Lanham: Rowman & Littlefield Publishers Inc, 1999), 70: 'Constitution-making rests on the pre-existence of an ethnically homogeneous nature, capable of effectively distinguishing itself from other people and if necessary, in not waging war against them'; also *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 102.

⁸³³ *Supra*:: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 70.

⁸³⁴ *Supra*: Samples 'Review of The Crisis of Parliamentary Democracy', 205-214; see Richard Thoma 'The Reich as a Democracy' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 157, 161: 'German democracy proves to be one of an overwhelmingly liberal stamp, with some concessions to popular referenda in tune with radical democracy'.

⁸³⁵ Carl Schmitt 'The Liberal Rule of Law' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 294, 297.

⁸³⁶ *Ibid*.

⁸³⁷ *Supra*: Carl Schmitt *Constitutional Theory*, 286.

Insulated from the perils of pluralism, vitalisation of the people's unitary *will* is what Schmitt propounds to produce a democratically based system, freed from the manacles of liberalism.⁸³⁸ In contrast, normativisation stifles it. Belief that this quintessential *will* is susceptible to formalisation through a variety of pre-ordained procedures is equivalent to the conversion of fire into water.⁸³⁹ Absent within Schmitt's conceptualisation is any mandatory correspondence between '*democracy and [the] so-called 'democratic procedures'*',⁸⁴⁰ characteristically associated with the *Rechtsstaat*: separation of powers, the publicly promulgated general norm, individual contra-state rights and repudiation of *ex post facto* criminal law.⁸⁴¹ In no sense, therefore, does Schmitt's embrace of democracy as a state form imply acquiescence in those rule-of-law type aspects often, if inappropriately, considered indispensable to it.⁸⁴² To Schmitt, it is the will - and consequential decision - of a politically homogenous people that is everything and the constituent elements of the people - human beings - nothing. Only from such unity of the *demos* does legitimacy transpire. But when contextualised, as here, within an already *subsisting* legal order, what ensues from the substantive homogeneity that Schmitt considers so fundamental?

Though Schmitt predicates democracy on the presupposition that '*the people are always the entire people of the political unity*',⁸⁴³ he is likewise explicit that '*the political unity as a homogeneous and closed entirety is distinguished in a particular way from all*

⁸³⁸ See *supra*: Schmitt *The Concept of the Political*, 32: 'The equation politics equals party politics is possible whenever antagonisms among domestic political parties succeed in weakening the all-embracing political unit: the state. The intensification of internal antagonisms has the effect of weakening the common identity vis a vis another state'.

⁸³⁹ *Supra*: Scheuerman *The End of Law*, 71; on the importance to Schmitt of supra-normativism, see his 'The Legal World Revolution' *TELOS* No. 72, (Summer 1987), 73-91; also *supra*: Dyzenhaus *Legality and Legitimacy*, 53: 'The idea of a people transcends any attempt at formalisation. Its weakness as a subject lies in the same fact. It is incapable of definitive organisation'.

⁸⁴⁰ Ellen Kennedy 'Carl Schmitt and the Frankfurt School: A rejoinder' *TELOS* No.73, (Fall 1987), 101-116.

⁸⁴¹ Here, Schmitt departs from a commonly understood democratic concept of the state based on the rule of law and embracing the central buttresses of liberal ideology ; see for example *supra*: Heller 'The Essence and Structure of the State', 265: 'It is a political reality of the greatest practical significance that the democratic organisation of the state based on the rule of law, with its division of powers and guarantees of basic rights, limits the leadership's political power through constitutional precepts. It secures for all members of the citizenry without exception a certain measure of freedom'.

⁸⁴² This is starkly highlighted *supra* by Schmitt in his *Preface to the Second Edition of The Crisis of Parliamentary Democracy*, 16, 'Bolshevism and fascism are, like all dictatorships, certainly anti-liberal but not necessarily antidemocratic'. It is, therefore, clear that even the most authoritarian regimes are not precluded democratic status.

⁸⁴³ *Supra*: Carl Schmitt *Constitutional Theory*, 299.

other domestic groupings and organisations'.⁸⁴⁴ As such, discrete internal affiliations are intrinsic to a viable democracy. Because political power within the democratic model is demonstrated by '*knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity*'⁸⁴⁵ it is possible for '*a democracy [to] exclude one part of those governed without ceasing to be a democracy*'.⁸⁴⁶ Is Schmitt, therefore, disingenuous when he seeks to define homogeneity as the unity of the nation⁸⁴⁷ when what he essentially promulgates is democratic legitimacy resting '*on the idea that the state is the political unity of a people*'?⁸⁴⁸ This affords Schmitt the licence to conceptualise 'a people' as he deems expedient on the premise that the '*equality that is part of the essence of democracy orientates itself internally and not externally*'.⁸⁴⁹ More disquietingly, where homogeneity does not exist, Schmitt ordains that this is readily achievable.⁸⁵⁰ To this end, he advocates not only peaceful methods such as separation and assimilation but also quicker, more forcible devices, including resettlement and repression of '*alien components*'.⁸⁵¹ Implicit within this perspective are the draconian exclusionary methods characteristic of some dictatorial regimes, nonetheless adjudged by Schmitt compatible, or at least not inconsistent, with the democratic model. This is a task to which the liberal rule of law state will never be equal:⁸⁵²

⁸⁴⁴ *Ibid*: 299.

⁸⁴⁵ *Supra*: Schmitt *Preface to the Second Edition of The Crisis of Parliamentary Democracy*, 8.

⁸⁴⁶ *Ibid*: 9; cf. Richard Thoma 'The Reich as a Democracy' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 157: 'What it [the people] means is the totality of all adult Germans, conceived as a united association enjoying equal rights...Thus, it signifies an active citizenry enjoying a universal and equal right to vote and to take part in the electoral process. The people in Article 1 paragraph 2 of the Weimar Constitution refers to the nation, that is, to Germans as such, not differentiated in one way or another'.

⁸⁴⁷ See *supra*: Schmitt *Constitutional Theory*, 128; here, Schmitt appears to equate the people and the nation as the source of all political action.

⁸⁴⁸ *Ibid*: 138 (author's underlining).

⁸⁴⁹ *Ibid*: 258.

⁸⁵⁰ This view, Schmitt espouses in 1928, at the height of his supposed rapprochement with facets of liberal constitutionalism and five years before the rise to power of the National Socialists on their bandwagon of Volkish supremacy, with the attendant alienation of German Jewry and other mass sectors of German citizenry. See, however, *supra*: Balakrishnan, 71: [According to Schmitt] 'in a crisis homogeneity of the demos had to be secured by exclusion of the heterogeneous but Schmitt rejected ethnic or racial segregation because it was not possible to define homogeneity along any particular dimension'.

⁸⁵¹ *Supra*: Schmitt *Constitutional Theory*, 234: on this point, see *supra*: Dyzenhaus *Legality and Legitimacy*, 56. On this point see also Andreas Kalyvas *Democracy and the Politics of the Extraordinary* *Max Weber, Carl Schmitt and Hannah Arendt* (Cambridge: Cambridge University Press, 2008), 122 where Kalyvas takes the view that Schmitt's ideology is neither totalitarian nor racial and that, for Schmitt, the constituent popular sovereign does not have to be a homogenous ethnic community.

⁸⁵² See *supra*: Schmitt 'The Liberal Rule of Law', 294, 300: 'Politically, nothing is more necessary than to envision the task of integrating the German people into political unity from the inside. Theoretical reflection is necessary to achieve this as well as a clear recognition of the dangers and contradictions of

‘Arguments that democracy requires homogeneity is ominous because plebiscitary dictatorships, albeit illiberal, could be described as true democracies.’⁸⁵³

Evident from his absorption with homogeneity is that whilst the *‘entire people are necessarily a political entity’*,⁸⁵⁴ the converse does not similarly hold true. The political entity need not, therefore, correlate with the entire people. Rather, the efficacy of the democratic enterprise rests on parity between the substantively ‘equal’ - assessable only via Schmitt’s ill-defined categories - and ruthless excision of the remainder. Because democratic regimes recognise *‘only the equality of equals and the will of those who belong to the equal’*,⁸⁵⁵ essential to their survival is this coalescence between equality and homogeneity. Nowhere in Schmitt’s Weimar work are these more crucially relevant or more fully elucidated than in *CT* and yet his treatment remains tantalisingly elusive.⁸⁵⁶ Beyond doubt, nonetheless, is that Schmitt’s radicalised democratic theory does instantiate a re-formulated conception of *‘unity from below (out of the substantial homogeneity of a nation)’*.⁸⁵⁷ Consistent with the bedrock of conventional democratic theory, this appears to entail nothing beyond the existential presence of a thriving, unified polity *within* an established legal order.⁸⁵⁸ If so, the *raison d’etre* of the ‘people’ is merely to buttress and sustain a subsisting democratic regime; effectively to authenticate from beneath. But is this all that Schmitt intends? Evidently not, for it is his innovative instrumentalisation of ‘the people’ as a quasi-foundational norm that spells his departure from orthodox democratic theory.⁸⁵⁹

the current situation. It is the central task of integrating the proletariat into a new state that reveals the inadequacy of the methods of the state based on the liberal rule of law’.

⁸⁵³ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 71.

⁸⁵⁴ *Supra*: Schmitt *Constitutional Theory*, 371.

⁸⁵⁵ *Ibid*: 256.

⁸⁵⁶ For an alternative view, see *supra*: Kalyvas *Democracy and the Politics of the Extraordinary* Max Weber, Carl Schmitt and Hannah Arendt, 155: ‘As I see it, too much ink has been wasted over his [Schmitt’s] alleged glorification of substance, homogeneity and identity’.

⁸⁵⁷ *Supra*: Schmitt ‘The Liberal Rule of Law’, 294, 306.

⁸⁵⁸ As seen *infra*, Schmitt’s insistence on homogeneity does deviate even here from typical democratic theory.

⁸⁵⁹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195: Balakrishnan posits that though Schmitt likened ‘the people’ to a foundational norm, ‘it was never entirely clear why the will of the people was a cogent basis for the establishment of a constitution’.

1 (i)(b) Homogeneity and transcendence

Crucial here is the idea of unity '*from above (through command and power)*'⁸⁶⁰ and, in turn, the conjunction between absolute sovereign power and the will of a politically unified homogenous people. What emerges is that 'the people', as a unified political entity, exists *a priori* the state.⁸⁶¹ To this extent, the presumption of anteriority is indispensable. As such, '*the people, the nation, remain the origin of all political action, the source of all power, which expresses itself in continually new forms*'.⁸⁶² As long as a will to political existence prevails, the indissoluble will of the people is superior to any normative framework and, in its life force and energy, is inexhaustible.⁸⁶³ As the *pouvoir constituant* - the constitution-bearing people that grant themselves their constitution⁸⁶⁴ - they possess an existential quality that cannot be '*delegated, alienated, absorbed or consumed*'.⁸⁶⁵ This '*fundamental, irrefragable, existential verity*'.... '*remains always present, dependent on the circumstances*'.⁸⁶⁶ Untenable, to Schmitt, is any purported subjection of the *pouvoir constituant* to the normativities, procedural constraints and institutional limitations of the resultant constitutional system (*pouvoir consitue*). Only the former is '*omnipotent, inalienable and indivisible*'.⁸⁶⁷ It is the state, as constituted power that is sublimated to the '*will of a substantial nation as the pouvoir constituant,*' with the capacity, latent within it to establish, interpret and alter the constitution at will and, thus, '*to disrupt every day constituted politics*'.⁸⁶⁸ Because of this vibrant transcendent character, Schmitt ensures that the will of the people, as the only true source of the *pouvoir constituant*, may '*never be encompassed or controlled by the written constitution*'.⁸⁶⁹ The latter is relevant only to the extent that '*the concrete existence of a people has its concrete form in the constitution*'.⁸⁷⁰

⁸⁶⁰ *Supra*: Schmitt 'The Liberal Rule of Law', 294, 306.

⁸⁶¹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 95: 'The will of the people is anterior to any constitution and no constitution can be considered a definitive form of this popular will. The extrinsic and legitimating authority of the people is outside any written scheme of constitutional norms'.

⁸⁶² *Supra*: Schmitt *Constitutional Theory*, 128.

⁸⁶³ *Ibid*: 131.

⁸⁶⁴ *Ibid*: 255.

⁸⁶⁵ *Ibid*: 140.

⁸⁶⁶ *Supra*: Wolin 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', 424-447.

⁸⁶⁷ *Supra*: Scheuerman *The End of Law*, 70.

⁸⁶⁸ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 30; see *supra*: Carl Schmitt, *Constitutional Theory*, 132, where Schmitt confirms the supremacy of the people, as an unmediated will, 'over every constitutional procedure'.

⁸⁶⁹ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 100; cf. *supra*: Scheuerman *The End of Law*, 81: 'although the will of the German people allegedly lacks all normative elements, it gains expression only by means of the characteristically normative device of the codified

At first glance, the potentially sublime quality that Schmitt seeks to attribute to the will of the people undermines his claim that ‘*all democratic thinking centres on ideas of immanence*’.⁸⁷¹ But is his formulation as self-contradictory as may appear? Perhaps not, for the dichotomy within Schmitt’s conceptualisation purely signifies that it is the *will of the people* alone (perceived as existential and transcendent) that possesses the capacity to surpass *the people* (as immanent presence). Wholly unfettered, the ‘people’s will’ achieves an almost God-like - though adamantly concrete rather than divinely imbued - transcendence.⁸⁷² Perhaps not functionally dissimilar to the Kelsenian hypothetical (transcendental) basic norm that Schmitt discounts, it is the quasi-mythical nature of this pure theory of the people’s will⁸⁷³ - rather than the ungrounded sovereign decision - that underpins the entire constitutional order. Whether, as Heller claims, the will of the people is purely a ‘*formless-forming*’, incapable of operating as *pouvoir constituant*, comprises no deterrent.⁸⁷⁴ The plebiscite now becomes a means of ‘*manufacturing consent from above*’.⁸⁷⁵ Unashamedly supra-normative, this elevatory process is the best guarantee Schmitt proffers for the legitimacy he craves.⁸⁷⁶

1(ii) The temporal sequence

As above, this generates an additional conundrum. If ‘*democratic legitimacy rests on the idea that the state is the political unity of a people*’,⁸⁷⁷ how and at what precise moment does Schmitt envisage that this homogenous entity must arise? Plausible though attainment of a shared set of values may be once the state is *in situ*, to what extent is this practicable within the pre-state condition? How is ‘the people’ to have the requisite political consciousness to distinguish between friend and enemy⁸⁷⁸ when this decision seemingly becomes imperative only in the face of an existential threat to a

constitutional clause’. As such, Scheuerman concludes that Schmitt’s own scheme is not entirely norm-less.

⁸⁷⁰ *Supra*: Schmitt *Constitutional Theory*, 166.

⁸⁷¹ *Ibid*: 266 ‘Every departure from immanence would deny this identity. Every type of transcendence that is introduced in to a people’s political life leads to qualitative distinctions of high and low, above and below, chosen etc while in a democratic state, state power must derive from the people’.

⁸⁷² *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xv: ‘Schmitt [in *Legality and Legitimacy*] says that there are preconstitutional and pre-legal values to which appeals can be made when the formal rules of a regime collide or are vulnerable. These are the source of the regime’s legitimacy’.

⁸⁷³ *Supra*: Scheuerman *The End of Law*, 81.

⁸⁷⁴ See *supra*: Heller ‘The Essence and Structure of the State’, 265, 278; it is clear that Schmitt posits the unified political will of the people as a transcendent entity - nothing is capable of occupying transcendent status over it.

⁸⁷⁵ *Supra*: Scheuerman *The End of Law*, 106.

⁸⁷⁶ *Ibid*: 68-69.

⁸⁷⁷ *Supra*: Schmitt *Constitutional Theory*, 138.

⁸⁷⁸ *Ibid*: 275

unity that is not extant?⁸⁷⁹ In short, to what extent is it possible for the perfectly formulated, political will of a unified people to spring into being *prior* to the establishment of the state? If, for Schmitt, ‘the people’ is the subject (as well as the object) of any democratically engendered decision, this surely requires ‘*the people to presuppose its own existence*’?⁸⁸⁰ But how is it feasible for the political unit, constituted by the decision, to be the selfsame entity that validates that decision *from above*?⁸⁸¹ Reminiscent of the implicit logical circularity Schmitt himself appears to discern and avoid, in *CPD*, ‘*the people constitute a unified will if they have the will to constitute themselves as a unified will in the face of an enemy that poses a threat to the not yet formed unified will*’.⁸⁸² This, according to Caldwell, creates an unacceptable conflation between a presupposition of the pre-existence of a unified people capable of yielding a decision through its collective will and a mere assertion that such a will exists:

‘Turning to a metaphysics of existence was Schmitt’s answer to the logical or epistemological problem of the grounds of the constitutional system. It was an assertion, not an argument.’⁸⁸³

Through this hypostatisation of the plebiscitary will, Schmitt strives to authenticate the entire legal order.⁸⁸⁴ The central paradox, latent within his formulation, he strives to solve purely ‘*by asserting the immediate presence of a sovereign people; a people substantially homogeneous in some basic respect, such as race, or religion that became political in response to an external existential threat to their unity*’.⁸⁸⁵ But how convincingly does Schmitt explain the means by which ‘*the cause of democracy is a democratic decision*’;⁸⁸⁶ in essence that ‘*the unity of the nation is composed prior to its legal constitution*’?⁸⁸⁷ If rooted in reasoning ironically beyond the remit of rationalisation, is what Schmitt advocates - namely a pre-supposed politically unified will with the capacity to exist *a priori* the state - merely a ‘*political ideology but*

⁸⁷⁹ See also *supra*: Kalyvas *Democracy and the Politics of the Extraordinary Max Weber, Carl Schmitt and Hannah Arendt*, 123-4: Kalyvas recognises this ‘blatant contradiction’ within Schmitt’s thesis but seeks - not entirely convincingly - to rationalise it by asserting: ‘it has something to do with his [Schmitt’s] sometimes peculiar and rigid understanding of liberalism’.

⁸⁸⁰ *Supra*: Dyzenhaus *Legality and Legitimacy*, 54.

⁸⁸¹ *Ibid.*

⁸⁸² *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 101.

⁸⁸³ *Ibid.*

⁸⁸⁴ See *supra*: Schmitt *Legality and Legitimacy*, 90: ‘plebiscitary legitimacy is the single type of state jurisdiction that may generally be accepted as valid today...it stems directly from the fact that plebiscitary legitimacy is at present the single last remaining source of justification’.

⁸⁸⁵ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 116.

⁸⁸⁶ *Supra*: Shapiro *Carl Schmitt and the Intensification of Politics*, 47.

⁸⁸⁷ *Ibid.*

certainly not a theory of the state?⁸⁸⁸ Given the arguably irrational nature of this postulated resolution of the antinomy between the anteriority of law and power,⁸⁸⁹ on what basis does Schmitt profess to discard other available theoretical options? As his interrogation into a quasi-democratic foundation for the state intensifies, the alternatives below he either distorts or rejects - his critique in part seemingly beset with the same paradoxical logic integral to his own late-Weimar state theory.

1 (ii)(a) God as the foundation for the legal order

The threat to orderly civil society, once detected within the plebiscite⁸⁹⁰ emanates, for the 1928 Schmitt, from the introduction into political life of state power derived from God. In short, he contrasts the democratic essence of the unified polity with the undemocratic transcendence of God and substitutes his prior distrust of the one for his repudiation of the other. Just as in *PT*, the will of the people unacceptably jars with sovereign *voluntas*, no greater guarantee exists that the will of God is likely to accord with it. What Schmitt seems to fear is the necessity for human intervention - other than via the will of the people as a democratic unitary entity - to interpret the will of God. Such unwarranted intercessions are likely to degenerate into a contest for supremacy between the people and the postulated will of God, as fraudulently represented by those who wish to challenge the political essence of the people. This, Schmitt cannot countenance. It is only in the will of the people where legitimacy truly resides. Sovereign authority, now duly authenticated through the will of a politically unified people, must brook no challenge:

‘State power does not even derive from God. As long as a possibility exists that another besides the people decides definitively what *in concreto* God’s will is, the appeal to the will of God contains a moment of undemocratic transcendence. The principle ‘all power derives from God’ can possibly mean that state power is exercised even against the will of the people; in this

⁸⁸⁸ *Supra*: Heller ‘The Essence and Structure of the State’ in *Weimar A Jurisprudence of Crisis*, 265; Heller concedes that ‘one might answer the question of its presupposed unity by saying that in a certain sense the unitary people constitutes itself and in its conscious identity with itself is even a political unity capable of action.’ In that event, this possible explication of Schmittian theory is arguably reminiscent of Schmitt’s own concrete-order thinking, developed around 1934. However, this invites inquiry into whether any proximity exists between this mere *assertion* of unity by Schmitt and reliance on a quasi-natural law foundation for the state, as Kelsen was pejoratively to attribute to Schmitt.

⁸⁸⁹ As seen below, the paradox Schmitt encounters is one common to constitutional democracy theory in that there is always ‘an undecidable moment’ when ‘law and power each seem to be the foundation of the other’; on this point see *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 95.

⁸⁹⁰ As in *Political Theology* (1922) and to a lesser extent in *The Crisis of Parliamentary Democracy* (1923).

meaning, it contradicts democracy.... If God, in whose name one governs is simply not this people's God, the appeal to God's will can lead to the fact that the will of the people and the will of God are different and collide with one another.'⁸⁹¹

1 (ii)(b) The normativist 'solution'

The insight Schmitt gleans from his idiosyncratic exposition of democratic theory and practice serves to intensify his polemic against liberal constitutionalism. Asinine, in his view, is any type of normative solution that liberalism may advance relating to the founding and functionality of the *Rechtsstaat*; *a fortiori* when the constitution professedly derives from the Kelsenian basic norm:

'The decision requires no justification via an ethical or juristic norm. Instead it makes sense in terms of political existence. A norm would not at all be in a position to justify anything here.'⁸⁹²

Free-floating spectral norms cannot spontaneously spring into being, any more than they are capable of self-interpretation, application or execution: '*...a sovereign constitution, free-standing and somehow above the people, was a normativist fiction. No norm applied itself*'.⁸⁹³ How is a norm capable of self-propagation or fulfilment?⁸⁹⁴ An enduring thematic strand within Schmitt's writings for the duration of the Weimar period,⁸⁹⁵ nowhere does he express his derision more vehemently than in his *Legality and Legitimacy (1932) (LL)*:⁸⁹⁶

'No norm, neither a higher or lower one, interprets and applies, protects or guards itself; nothing that is normatively valid, enforces itself and if one does not intend to trade in metaphors there is also no hierarchy of norms but rather only a hierarchy of concrete persons.'⁸⁹⁷

For the Schmitt of *CT* and beyond, therefore, a legal order continues to emanate from a decision requiring the existential presence and active involvement of *concrete persons*.

⁸⁹¹ *Supra*: Schmitt *Constitutional Theory*, 266.

⁸⁹² *Ibid*: 136; see also *supra*; Schmitt *On the Three Types of Juristic Thought*, 69: 'A pure normativism must deduce the positive norm from a norm superior to the positive'.

⁸⁹³ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 67.

⁸⁹⁴ As a variant on both Schmitt and Kelsen, Hermann Heller posits that just as power must be understood in terms of norms, norms cannot be understood outside of their relationship with the power that is required to positivise them; on this point see David Dyzenhaus 'Introduction to Hermann Heller' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 249, 253; *ibid*: 254: 'Norm and power must be understood as components of a dialectical unit. They are not reducible to each other or to any common element; rather, the existence of the one presupposes the other'.

⁸⁹⁵ *Supra*: Schmitt *Constitutional Theory*, 138: 'A norm cannot legitimate itself. Its validity depends on the existential will of those who issue it'.

⁸⁹⁶ *Supra*: Schmitt *Legality and Legitimacy*.

⁸⁹⁷ *Ibid*: 54; this is repeated verbatim in his *On the Three Types of Juristic Thought*, 50 *supra*.

The 'people's will' legitimates the originary sovereign decision and, in turn, the will of the sovereign, as duly authenticated, comprises the foundation of the entire regime. Schmitt appears to regard any other postulated basis for the state as an exercise in futility. Without the validating force of the plebiscitary will to generate the decision of the sovereign entity, no legitimate legal system is possible.⁸⁹⁸ What ensues is a condition in which there is '*no state and no political unity. Instead there is a senseless power apparatus, a system of despotism and tyranny*'.⁸⁹⁹

This leads Schmitt into other tendentious territory. Problematic, in his view, is the role liberals insist on according and, dichotomously, depriving parliament. Once institutionalised within the archetypal *Rechtsstaat*, the legislature (*Reichstag*) introduces and enacts law in statutory form, by which the individual citizen is then bound. In itself, this is non-contentious and remains so, provided that parliament - presumably as the manifestation of the people's will - is able to maintain 'sovereignty' over the law. But this is not the case. Liberals wish the rule of law, not the rule of men to triumph.⁹⁰⁰ To this end, not only does '*the positivist subject himself unconditionally to Parliament but expects parliament to subject itself to the law*'.⁹⁰¹ Subjugation of the law-making agency to the law it generates is, to Schmitt, untenable. This is particularly so where '*a statute which comes about via the proper legislative process with a large or overwhelming majority has found the acclamation of the people*'.⁹⁰²

In a rare attribution of residual merit to the parliamentary system, Schmitt concedes that acclamation of this type may '*represent a genuine act of sovereignty and drawing on*

⁸⁹⁸ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 189: 'Schmitt wants a post-rationalist plebiscitary democracy'.

⁸⁹⁹ *Supra*: Schmitt *Constitutional Theory*, 143.

⁹⁰⁰ *Ibid*: 182: 'The rule of law means above all that the legislature itself is bound by its law and its authority becomes legislation, not the means of an arbitrary rule'; *supra*: Schmitt *On the Three Types of Juristic Thought*, 49: 'Normativism claims impersonal objective justice and demands that law, not men shall rule'.

⁹⁰¹ *Ibid*: Schmitt *On the Three Types of Juristic Thought*, 67: 'The positivist subjects himself to a decision of whichever current legislator possesses state power because only this legislator has power to bring about the decision's realisation. At the same time the positivist demands in addition that this decision have a firm and inviolable value as a norm, that is, that the state legislator himself be subject to the very same statute and its interpretation that had been created by him. Through the normativisation of legality, this legal system rises above the power decision of the state and now places normative demands on the legislator'.

⁹⁰² *Supra*: Schmitt *Constitutional Theory*, 287.

the strength of the political, it may rupture the norms of Rechtsstaat legality'.⁹⁰³ If parliament is capable of acting as a genuine representative of the people's will, then it should invariably reflect that will and not be constitutionally constrained thereafter to act in a manner demonstrably contrary to the popular mandate.⁹⁰⁴ How then, Schmitt queries, is it feasible for the same entity – whether legislature or otherwise - to be simultaneously subject and object of the same legal norm? This critique of the liberal constitutional state, Schmitt appears to found upon the flaws, both theoretical and methodological, which he detects within it. In turn, however, does it not tend to echo those enmeshed within his own elevation to transcendent status of the people's will, and the contingent subjugation of 'the people' to it?

1 (ii)(c) The Hobbesian social contract theory - a covenant between individuals as the foundation of the state

From a Hobbesian perspective, civil society is founded upon a contractarian theory, wherein Man forfeits those rights that were his, by nature, in the pre-state condition.⁹⁰⁵ As seen, this is the bargain that each individual makes, one with another, as a pre-requisite for ceding his bundle of natural rights to the Commonwealth and, more precisely, to the sovereign who rules over it. Invocation of the natural pre-state condition of Man and the troubled plight of the individual within it enables Hobbes to avoid any imputation of circularity of logic. To justify his theoretical foundation for the state, Hobbes relies upon a compact between previously unaligned, and indeed, antagonistic individuals. The empirical existence of such disparate and conflictual individuals cannot be denied. Though susceptible to criticism on numerous grounds Hobbes' state theory here, at least, seems viable.

⁹⁰³ *Supra*: Schmitt *Constitutional Theory*, 287; also *supra*: Schmitt *Legality and Legitimacy*, 23 in which Schmitt asserts that where 'the will of parliament is identified with that of the people', this is capable of creating legitimacy.

⁹⁰⁴ It may be equally asserted that parliament ought to be bound by statutes, made with the acclamation of the people since only then is it fulfilling the people's will. If it were not thus bound by its own statutes, then it would be presumably be in violation of the will of the people. This is a possibility which Schmitt neglects to discuss.

⁹⁰⁵ This is discussed *supra*: section 5.

However, the social contract so central to the Hobbesian construct of the state is, for Schmitt, no more than a private and fragmentary covenant.⁹⁰⁶ Regrettably, it betrays *'the indecisiveness in Hobbes' thought at the juristically decisive point, namely the legal foundation of the state as a covenant entered into between individuals'*.⁹⁰⁷ Any pledge of obedience between individuals who subscribe to it, is vulnerable to fracture and dissolution at any time.⁹⁰⁸ As such, it lacks what is quintessential to a cogent foundation for a legal order. What is instead required is the mythical allusion to a state realised through a juridical miracle, wholly unattainable through a bargain between individuals.⁹⁰⁹

'If this construct is viewed from its result, from the perspective of the state, what it reveals is that the state is more than and something different from a covenant concluded by individuals; for though it results in forging a consensus of all with all, it is not a state but only a social covenant.'⁹¹⁰

As before, what Schmitt perceives within the pre-state condition is a normative vacuum from which a sovereign decision emanates in sparkling simplicity as an unmediated response to the concrete reality. Whereas through reliance on natural law, Hobbes extracts validity for the state and seeks to rationalise the subsequent subjection of its citizens to sovereign authority, both of these Schmitt jettisons.⁹¹¹

'The modern 'total state' needed to assume a mythical form because, more radically than Hobbes' relatively modest political construction, it had severed its basis in any underling natural law limitation on political form.'⁹¹²

⁹⁰⁶ See *supra*: Wolin 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', 424-447: (citing Strauss), 'It is not Hobbes *qua* theorist of the social contract whom Schmitt reveres; most definitely not for this is the Hobbes who became the intellectual progenitor of liberalism'.

⁹⁰⁷ Carl Schmitt *The State as Mechanism in Hobbes and Descartes*, 1937 [Appendix to *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, Connecticut: Greenwood Press, 1996).

⁹⁰⁸ See *supra*: Schmitt 'The Liberal Rule of Law' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 294, 311: 'No state unity can be based solely on the principle *pacta sunt servanda* for the single social groups, as contract-forming groups, are then as such the decisive powers that make use of the contractual bond. They face itself as independent political powers and what unity there is merely the result of a licence that is terminable'.

⁹⁰⁹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000, 216.

⁹¹⁰ *Supra*: Carl Schmitt *The State as Mechanism in Hobbes and Descartes*, 1937, 97.

⁹¹¹ See *supra*: Wiegandt 'The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt', 1569-1588; here, Wiegandt highlights Schmitt's drastic excision of natural law from Hobbesian theory; also *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 37: 'With admirable clarity in the 17th century, Hobbes thought through the idea of a commonwealth brought about by human reason...the decisive step occurred when the state was conceived as a product of human calculation'.

⁹¹² *Supra*: *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000, 216.

With the emergence of the leviathan state, Schmitt distorts the significance respectively accorded the individual and sovereign. Hobbes' sovereign now only becomes '*omnipotent through the consent that he himself produced and made possible via the omnipotence of the decision of the state*'.⁹¹³ Similarly, the contract or '*more precisely the consent of the individual is possible through a sovereign guarantee of an order and through the state*'.⁹¹⁴ In this reconfiguration, the sovereign decision seemingly precedes the consent of the subjects over whom authority is exercised. Though consistent with the general tenor of Schmitt's thought, this analysis is at variance with Hobbes' contractarian theory wherein the state derives from - rather than giving rise to - the crucial, fictive agreement between individuals. Temporally, first, for Hobbes is the state of nature within which the atomised individual dwells; second, the agreement between individuals to escape the state of nature; last the sovereign entity through which the Commonwealth becomes feasible. Through his chronological re-sequencing, however, Schmitt is able to claim that the sovereign decision is *anterior* to the compact between individuals. Quite simply, in the absence of the one, the other is unattainable, as is Hobbes' dream of a viable Commonwealth:

'A minimal consensus with its roots in a rationalist contractarian social theory would not have sufficed for the author of *Political Theology* in securing a workable sovereign state.'⁹¹⁵

In essence, what Schmitt contrives to achieve is the re-location of Hobbesian theory within a normative vacuum and the elimination of any element of voluntarism on the part of those destined to comprise the citizenry of the not-yet established state. This re-interpretation Schmitt completes by the irrational intervention of the sovereign decision and the consequential accord of the grateful throng. Once the sovereign entity successfully exploits the consent it generates, the state subsumes the individual within it. But this re-working of Hobbes creates a contorted *denouement* from which Schmitt must then strive to escape. For once Schmitt strips Hobbesian social contract theory of its rational premise, from what source does the legal order purport to derive its legitimacy?

Schmitt appears more faithful to Hobbes in his assertion that the sequential power of the state within Hobbesian theory rests on the ongoing '*general consent of the people*'.⁹¹⁶

⁹¹³ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 73.

⁹¹⁴ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 73.

⁹¹⁵ *Supra*: Gottfried Carl Schmitt *Politics and Theory*, 65.

But this still does not obviate Schmitt's problematic interjection of the *pre-consensual* sovereign decision. How is Schmitt able to justify an interpretation of Hobbes whereby the covenant between individuals to enter civil society is possible only through the power of the sovereign decision and that the converse is simultaneously true? Or does he here fall foul of the same type of circular reasoning that bedevils his own theoretical formulation whereby the politically unified will of a homogenous polity is supposedly capable of acting both as pre-state constitutive principal and post-state constituted agent?

⁹¹⁶ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 73.

2. Viability of sublimation of the ‘will of the people’?

Undaunted by possible shortcomings within his artfully woven concept of homogeneity and its complex interface with democracy, Schmitt must now mesh his fully-conceived notion of popular sovereignty with the imperative of untrammelled sovereign decision:

‘Schmitt’s challenge was to elevate sovereign power above abstract norms or volatile interests and at the same time to maintain its status (or its appearance) as representative of an underlying (or overarching) unity.’⁹¹⁷

By what means does Schmitt exalt but contemporaneously circumscribe the will of the people? This, in turn, hinges upon precisely *where* he chooses to locate ‘the people’ as a politically unified entity: beside, above or within the constitution? The first, the feasibility of a power-bearing people, occupying a space ‘beside’ the constitution to act out intermediary moments of *spontaneous* forms of popular mobilisation within the *normal political order*, appears to hold some appeal for Schmitt.⁹¹⁸ The people here Schmitt seeks to locate in ‘*spontaneous, extra-institutional popular assemblies, next to the constitutional order and in synchronicity to normal politics*’.⁹¹⁹ Not to be confused with elections nor part of a party-political infrastructure the role of these assemblies, however, remains obscure, as does their capacity to obtrude into the realm of the normal constitutional order.⁹²⁰ Schmitt’s treatment of them never exceeds the perfunctory. Rather, it is the remaining conceptualisations of the people’s will he appears to acknowledge as more viable possibilities.

Typically, ‘*the people can ‘exist “prior to” and “above” the constitution as pure constituent power’ and/or ‘they can exist “within” the constitution as members of an electorate*’.⁹²¹ These categories are not mutually exclusive for Schmitt. On the contrary, he imbues the people with the capacity for both transcendent existence and immanent presence. The one, the ‘*pouvoir constituant in its purest form*’ emerges during the extraordinary situation – the state of exception that comprises the backcloth for the

⁹¹⁷ *Supra*: Shapiro *Carl Schmitt and the Intensification of Politics*, 5.

⁹¹⁸ Duncan Kelly ‘Carl Schmitt’s Theory of Representation’ *Journal of the History of Ideas* Vol. 65, No.1, (Jan. 2004), 113, 121; see also *supra*: Kalyvas *Democracy and the Politics of the Extraordinary Max Weber, Carl Schmitt and Hannah Arendt*, 129-186 for a more sympathetic reading of Schmitt’s supposed defence of constitutionalism. Notably, however, Kalyvas focuses on Schmitt’s *Constitutional Theory (1928)* and makes little reference to his later *Legality and Legitimacy (1932)*.

⁹¹⁹ *Ibid*: Kalyvas, 179.

⁹²⁰ *Ibid*: 181: ‘He [Schmitt] did not develop this part of his theory and never confronted vexing questions, such as defining the relationship between institutionalised and non-institutionalised sovereignty’.

⁹²¹ *Supra*: Kelly ‘Carl Schmitt’s Theory of Representation’, 113, 121.

'formation of the nation'; the other, the *pouvoir constitue* subsists within 'the ordinary normal legal order'.⁹²² It is because 'the immanent will of the people has a transcendent character'⁹²³ that a dilemma confronts Schmitt. Determined to lionise the people's will as a supra-normative entity, he must achieve the converse vis a vis its immanent presence, if his idiosyncratic democratic project is to succeed.⁹²⁴

2 (i) The *pouvoir constitue* and the reconceptualisation of representation and identification

Uncontrolled 'the people', as an immanent entity, possesses the potential to challenge state power. This is especially so where it expresses its will - however imperfectly - through the machinery of pluralistic party-based representation within a parliamentary legal-constitutional system. Undiluted sovereign discretion requires an alternative, neither tarnished by the characteristic bastions of the rule-of-law *Rechtsstaat* nor infected by a debased liberal-democratic model. Democracy is unable to function efficaciously where it degenerates into a mere 'assertion of identity between law and the people's will'.⁹²⁵ 'Recognition of identity'⁹²⁶ is inadequate since a 'distance always remains between real equality and the results of identification'.⁹²⁷ If this occurs the minority can express the true will of the people and this, in turn, stymies any opportunity of genuinely representative governance.

With considerable pathos, Schmitt observes that the people then become overly prey to deception through propaganda and manipulation.⁹²⁸ True democracy, defined as government by the people, depends not on the parliamentary system, so beloved of liberalism. Rather, it rests upon strategic sublimation of the *demos* through Schmitt's ingeniously devised re-conceptualisation of the principles of *identity* and *representation*. What is needed is not the 'artificial machinery produced by liberal reasoning' but dictatorial methods capable of engendering 'a direct expression of the

⁹²² *Ibid*: 113, 124; as Kelly explains, Schmitt here appropriates, almost verbatim, the writings of Abbe Sieyes.

⁹²³ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 100.

⁹²⁴ *Supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 126: 'In his *Verfassungslehre*, he came to accept and recognise the *pouvoir constituant* of the people only because he had found a way to disarm it'.

⁹²⁵ *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 26.

⁹²⁶ *Ibid*: 27

⁹²⁷ *Ibid*: Schmitt *The Crisis of Parliamentary Democracy*, 27.

⁹²⁸ *Ibid*: this is the exact charge which may be accurately levelled against dictatorship of the type pedalled by Hitler. A key contributing factor in the Nazis' rise to power was their ability to seduce the populace by those selfsame devices that Schmitt alleges besmirch liberal-democratic parliamentarism.

democratic substance of power'.⁹²⁹ Only then is a genuine acclamation of the people generated. This heralds Schmitt's innovative '*modification of the definition of democracy*',⁹³⁰ characterised by insistence not upon a mere recognition of identities but an identity, real and palpable. Dynamically existential rather than '*a normative event, process or procedure*',⁹³¹ the identity attained through a qualitative confluence between rulers and ruled enables the governed to govern themselves in an actual, rather than purely figurative sense.⁹³²

For democracy to flourish, Schmitt must find a way to demonstrate and preserve this crucial identity between governors and governed (whilst, as below, simultaneously suppressing the ramifications that flow from it).⁹³³ This evokes the antinomy which Schmitt detects between the '*two opposing formative principles*'⁹³⁴ of identity and representation⁹³⁵ upon which the state, as a political unit, rests. Reliance on the one does not, therefore, correlate with embrace of the other. On the contrary, representation in the liberal-democratic sense negates the vital quality of identity on which true democracy depends.⁹³⁶ In short, the concept of representative democracy is, to Schmitt, an oxymoron:

'His aim is to rescue democracy from its overlay of liberal elements. But he defines democracy perversely as the identification of rulers and ruled – he made an appeal to plebiscitary leadership. Dictatorship provides the opportunity for expressing the seamless unity of the popular will. Liberal democrats, with their banal separation of powers, rules out the emotional fusion between rulers and ruled.'⁹³⁷

⁹²⁹ *Ibid*: 17.

⁹³⁰ *Supra*: Samples 'Review of The Crisis of Parliamentary Democracy', 205-214.

⁹³¹ *Supra*: Schmitt *Constitutional Theory*, 243.

⁹³² See *ibid*: 266: 'Those who govern are rendered distinct *by* the people, not *from* the people'; see *supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy* by Carl Schmitt, xxxii: 'Schmitt distinguished democracy from parliamentarism in terms of a concept of the people. In concrete terms, the people are heterogeneous but as the subject of democracy, the people are identical with the state'.

⁹³³ Horst Drier *The Essence of democracy – Hans Kelsen and Carl Schmitt Juxtaposed* in Hans Kelsen and Carl Schmitt *A Juxtaposition* ed. D.Diner/M Stolleis (Gerlingen: Bleicher Verlag, 1999), 71, 75: 'Carl Schmitt...talks about the identity between the governor and those governed in the quintessential meaning of the substantial homogenous nature of a people....Unity in a state is not achieved but is presumed or must be enforced'.

⁹³⁴ *Supra*: Schmitt *Constitutional Theory*, 247.

⁹³⁵ See *supra*: Dyzenhaus *Legality and Legitimacy*, 55: Dyzenhaus explains that for Schmitt, the principles of identity and representation are in opposition but do not exclude each other. Both are present, though only one will have the upper-hand. However, how Dyzenhaus queries, can Schmitt stop the principle of representation collapsing into the principle of identity or vice versa.

⁹³⁶ See *supra*: Seitzer *Introduction to Constitutional Theory*, 38: 'Modern political systems cannot be based on immediate identity because it is impossible for all members of the people to be actively involved in decisions and to fully participate in the political process. Political systems that attempt to overcome this lack of identity by proposing representation as a basic principle of democracy do not successfully generate legitimacy for themselves'.

⁹³⁷ *Supra*: Holmes *The Anatomy of Antiliberalism* (Cambridge, Massachusetts and London: Harvard University Press, 1996), 49.

To be compatible with democracy Schmitt stipulates ‘*re-presentation of the basis of identity in the symbolic form of leaders who either do or do not receive acclamation*’.⁹³⁸ But how is such acclamation achievable?⁹³⁹ What is required is a regime that facilitates expression of the irreducible, united will of the people through an act of public acclamation; unequivocal affirmation by a substantially homogeneous plebiscite.⁹⁴⁰ Secret ballot is, in contrast, antithetical to Schmitt’s notion of democracy.⁹⁴¹ It converts the political figure into a private citizen who is isolated in the decisive moment.⁹⁴² Creation of an instance of true re-presentation produces the leader Schmitt envisions⁹⁴³ - a president directly elected by the people⁹⁴⁴ whose legitimacy ‘*is not constituted by legality but through the will of the people who elected him*’.⁹⁴⁵ By this act of acclamation of the president and his politics, the people ‘*can be represented, embodied as a whole because he is the whole*’.⁹⁴⁶ But to what extent does this claim rest on a dubious presupposition that it is, somehow, feasible for ‘*a single univocal elected executive*’ to respect the demands of the electorate more comprehensively than ‘*a*

⁹³⁸ *Supra*: Seitzer *Introduction to Constitutional Theory*, 40.

⁹³⁹ *Supra*: Schmitt *Constitutional Theory*, 131: ‘The natural form of the direct expression of the people’s will is the assembled multitude’s declaration of their consent or their disapproval, *acclamation*’

⁹⁴⁰ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 29: ‘For Schmitt, democracy was a Caesarist plebiscitary dictatorship based on acclamation. Rule by acclamation, as a form of direct identification with the leader (not a private act of voting) was a distinguishing feature of democracy’

⁹⁴¹ Article 22 Reich Constitution provides: Reichstag delegates are elected by universal, direct and secret ballot by men and women over the age of twenty years according to the principles of proportional representation; *ibid*: Article 125: Liberty and secrecy of the vote is guaranteed’; also see *supra*: Schmitt ‘The Liberal Rule of Law’, 294, 298: ‘Democracy today is democracy without a demos, without a people. The democratic principle demands that the people in its entirety decides and governs responsibly. But the methods with which today’s democracies attempt to put the people’s sovereignty into practice are not democratic but liberal principles. Today, the people’s political decision comes into being by individual secret ballot. Public opinion is not the sum of private opinions of each individual....the amazing thing is that nowhere in our democratic constitution does the people appear; there are always only assembled representatives, the individual taken out of the mass..There is no public without the people and there is no people without a public’; also *supra*: Schmitt, *Constitutional Theory*, 242: ‘Representation can occur only in the public sphere. There can be no representation in private. As soon as the conviction establishes itself that what occurs publicly in the context of parliament has become only an empty formality and that the true decisions fall outside of this public sphere, parliament can perhaps still exercise some useful functions but it is just not any longer the representative of the political unity of the people’. To the extent that the liberal-democratic system seemingly operates in practice by a cabal (for example, the UK Cabinet developing policy in private for the majority in parliament to implement it under threat of exclusion from the prevailing Party, Schmitt is not entirely unfounded in highlighting the deficiencies of liberalism and denigrating parliamentarism as democracy without the *demos*.

⁹⁴² *Supra*: Dyzenhaus *Legality and Legitimacy*, 63.

⁹⁴³ *Supra*: Schmitt *Constitutional Theory*, 252 and 294.

⁹⁴⁴ Article 41, Reich Constitution 1919.

⁹⁴⁵ *Supra*: Schmitt ‘The Age of Neutralisations and Depoliticisations’, 130.

⁹⁴⁶ *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxxvi; also *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 118: ‘To Schmitt, democracy was a political form, a will free from contradiction and unified in a single person, representing the voice of the people’

broad-based multi-vocal elected legislature with hundreds of members’?⁹⁴⁷ This Schmitt refuses to concede. Paramount instead is his unique conceptualisation of an unmediated and irrefragable quasi-fiduciary relationship between president and people:

‘The authority of the president under the Weimar Constitution provides him with an opportunity to direct an appeal to the people and to produce a direct connection with the un-enfranchised state against the parliament. The president has a direct connection with the people. He unites in himself the trust of the entire people, as trustee of the entire people.’⁹⁴⁸

Yet what prevents ‘the people’, in the guise of quasi-beneficiary, from withdrawing its supposedly unified mandate from the trustee president and hence rescinding the authority vested in the incumbent leader? Is not a hallmark of traditional democracy the discretion of ‘the people’ to replace its collegially appointed representatives who, in consequence, occupy only a *‘magisterial and not a sovereign position’*?⁹⁴⁹ On the premise that *‘democracy is a conscious process of the formation of political unity from bottom to top’*, does not all representation, therefore, supposedly *‘remain legally dependent on the community’s will’*?⁹⁵⁰ Attribution of potentially unlimited power to the populace ‘within’ the constitution, as an immanent force, is too volatile to be left unchecked. Schmitt must curtail it.⁹⁵¹

Pivotal to this agenda of constraint is firstly the *‘substantial homogeneity of the people themselves’*,⁹⁵² through which Schmitt skilfully *‘finesses his definition of democracy to avoid making it refer to government that relies on changing public opinion’*.⁹⁵³ This enables *‘an ideal sovereign’* to benefit from *‘democratic legitimation without being stymied by majoritarian whims’*.⁹⁵⁴ Further, ‘the people’ is at liberty to produce an acclamatory decision - indeed, to engage actively in the electoral or law-making process at all - only when the supreme governor permits it. Within Schmitt’s concept of plebiscitary legitimacy – portrayed as *‘the single, valid type of state justification’*

⁹⁴⁷ *Supra*: Scheuerman *The End of Law*, 58.

⁹⁴⁸ *Supra*: Schmitt *Constitutional Theory*, 369.

⁹⁴⁹ *Supra*: Heller ‘Political Democracy and Social Homogeneity’, 256, 259.

⁹⁵⁰ *Ibid.*

⁹⁵¹ As Scheuerman highlights, Schmitt’s problem here flags up a paradox of liberal constitutionalism; see *supra*: Scheuerman *The End of Law*, 73: ‘once the people has founded constitutional government, the constitution then faces the difficult task of funnelling and channelling popular politics by legal means’.

⁹⁵² *Supra*: Schmitt *Constitutional Theory*, 267.

⁹⁵³ *Supra*: Gottfried Carl Schmitt *Politics and Theory*, 80; *supra*: Carl Schmitt, *Constitutional Theory*, 306: ‘When the majority is nothing more than the result of a tabulation of ballots cast in a separate individual vote, one can just as well say that the majority does not decide. Such statistical majority determination only has the sense of a restricted authorisation and limited effective political means for all state citizens to participate in state life’.

⁹⁵⁴ *Supra*: Gottfried Carl Schmitt *Politics and Theory*, 80.

available⁹⁵⁵ - the decision whether or not to pose the question and, in turn, the precise content of such inquiry rests entirely with the leader. In this, total confidence is reposed in the government or point of '*authoritarian origin*', not to '*misuse*' the '*great power*' and '*very significant and rare type of authority*' entrusted to it.⁹⁵⁶ Whether Schmitt is disingenuous in his conviction that the people will be well-served by this mode of governance is open to conjecture.⁹⁵⁷ Does he merely '*collapse law into charisma*'?⁹⁵⁸ Is legitimacy in the 'law' ultimately distilled into the simple faith of the people in the personal characteristics of the enactor? From what source do legal rules need to derive so as to accord them the validity quintessential to legitimate law-making? If the authenticity of positively-given provisions emanates, without more, from simple belief in the 'lawgiver', is not this a dangerous distortion of legal positivism where adherence to a preordained formal process for enactment of valid legal norms is paramount? Manifest here is the depleted role Schmitt reserves for procedural formality.

What is less clear, however, is the extent to which he intends to rest the authenticity of legal norms and the act of decision making that engenders them on their substantive content. If substance is to feature at all and, in such event, prevail over formal due process, what criteria does Schmitt postulate for the evaluation this entails? Do any extrinsic preconditions exist or does the lawgiver retain the sole subjective entitlement to determine what they comprise and the relative priority each should attract? Though flaws may inhabit a normativist regime that privileges form over substance does not this, at least, prescribe a procedural threshold the traverse of which is crucial to an efficacious conversion of arbitrary diktat to legally-valid norm? Whether charismatically infused law-making is capable of guaranteeing a higher degree of confidence in the validity of the legal order, and the rules that flow from it remains, therefore, unresolved. For recourse to belief in the validity of law – and the compliance this demands - purely on the basis of unquestioning faith in whoever possesses the requisite power to issue binding ordinances, appears to afford no more promise of legitimacy and determinacy than the positivism that Schmitt claims to despise.

⁹⁵⁵ *Supra*: Schmitt *Legality and Legitimacy*, 90.

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xli.

⁹⁵⁸ *Ibid.*

Whatever Schmitt's intentions, it is clear that the people – the ostensible bedrock of plebiscitary democracy - retain the right only to answer affirmatively or negatively to such questions as are sporadically laid before it.⁹⁵⁹ Within the resultant '*soccer stadium democracy*',⁹⁶⁰ a yes or no response signifies the full extent of the people's capacity to respond.⁹⁶¹ This, for Schmitt, is elemental.⁹⁶²

'The people can only respond yes or no. They cannot advise, deliberate or discuss. They cannot set norms but only sanction norms by consenting to a draft set of norms laid before them. They cannot ask a question but can only answer yes or no to a question placed before them.'⁹⁶³

Profoundly far-reaching are the implications of this draconian delimitation of the incipient power of the *demos*, now dissipated into an enfeebled horde.⁹⁶⁴ What fleetingly promised to be genuine recognition of the untapped force of the people's will – popular sovereignty – is '*negated without remainder*'.⁹⁶⁵ In short, Schmitt appears to reduce the political will of the people to a docile '*shapeless blob*', nonetheless inexplicably capable of exerting '*a shaping force*':⁹⁶⁶

'Schmitt's theory of plebiscitarianism rests on an agenda where the true leader manipulates the plebiscite in order to mobilise the inarticulate masses to support an agenda whose basic contours the leader has already set.'⁹⁶⁷

Scarcely open to contradiction, therefore, is the havoc Schmitt wreaks upon the empirical instantiation of the people's will within the constitution. This, he achieves through his distinctive conceptualisation of homogeneity and its subsequent deployment. Conjoined with a deftly-engineered utilisation of the principle of identity and his concomitant distortion of representation, the *sameness* of the people facilitates

⁹⁵⁹ See *supra*: Kaufman 'On the Problem of the People's Will', 191, 196, 'By their very nature, so-called direct plebiscites do not permit the plurality to take positive substantive action. It can answer the question that is put to it with a yes or no. In such a plebiscite, the plurality can only approve or disapprove the content from without and from above. Everything depends on the content of the question and the plurality cannot participate in or even exert influence over its formulation. The more directly the people as plurality wish to speak, the less influence it will have on the substance of what actually happens'.

⁹⁶⁰ *Supra*: Holmes *The Anatomy of Antiliberalism*, 49.

⁹⁶¹ *Supra*: Schmitt *Constitutional Theory*, 131: 'The people can always say yes or no, consent or reject, and their yes or no becomes all the more simple and elementary the more it is a matter of a fundamental decision on their own existence in its entirety'.

⁹⁶² *Supra*: Dyzenhaus, *Legality and Legitimacy*, 53.

⁹⁶³ *Supra*: Schmitt *Legality and Legitimacy*, 89.

⁹⁶⁴ See *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 105; Caldwell points out that for Kelsen, constructions of the state as coherent willing subjects, are primitive, totemistic fictions.

⁹⁶⁵ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 215.

⁹⁶⁶ *Supra*: Holmes *The Anatomy of Antiliberalism*, 49.

⁹⁶⁷ *Supra*: Scheuerman *End of Law*, 102.

the repression of the *unified polity*, just as effectively as Schmitt subjugates each individual constituent within it. Despite appearances to the contrary, sovereign authority survives unscathed:

‘Whilst apparently affirming mass democracy, Schmitt immediately contained it and made it compatible with authoritarianism through the categories of representation and identity....Constitutional Theory was a brilliant conservative effort in deconstructing and containing mass democracy.’⁹⁶⁸

Whereas the body politic *within* the legal-constitutional framework accords legitimacy to the traditional ‘*bottom to top*’ democratic structure, Schmitt, in contrast, seeks to enchain the people’s will.⁹⁶⁹ Whatever potential exists for the people to temper, challenge, control or revoke the authority their leader enjoys, he adroitly negates. To speak of the ‘people’s sovereignty’ becomes a misnomer. But how does Schmitt reconcile this relegation of ‘the people’ as an immanent presence, with the desire to depict its unified will as a transcendent entity? If, as Muller asserts, Schmitt’s reliance on the pre-existing form of political unity of a people equates to the type of power inhering within an absolute monarch, what does this augur for the ‘people’ as a supra-normative force?⁹⁷⁰ What is his specific agenda and does he permit ‘the people’ to retain dominion over constitutional norms? If not, who precisely is sovereign and how does Schmitt achieve the transposition of ‘sovereignty’ *from* the people *to* whomever he deems worthy of this supreme role?

⁹⁶⁸ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 31.

⁹⁶⁹ *Supra*: Heller ‘The Essence and Structure of the State’, 265, 273.

⁹⁷⁰ *Supra*: Muller *A Dangerous Mind*, 71.

2 (ii) Instrumentalisation of the *pouvoir constituant*

As above, beyond doubt is the matchless status Schmitt initially claims to accord the politically unified will of the people. Located above the legal-constitutional framework, the people ‘*can violate constitutional norms and settle legislation like an absolute monarch. The people are the highest judge and the highest legislator*’.⁹⁷¹ Left undeveloped, this would immunise ‘the people’, as *pouvoir constituant*, from any regulative constraints imposed upon it. But does this unconfined attribution of popular autonomy truly accord with Schmitt’s authoritarian programme? If not, is the ‘*top to bottom*’ structure, indicative of personalised autocracy, more palatable? Epitomised by a ruler who, as Head of State, ‘*unites in himself all state power*’,⁹⁷² this appears to dovetail with a concept of democracy, in Schmitt’s view, entirely reconcilable with dictatorship.⁹⁷³ In democracy lie the ingredients of legitimacy; in dictatorship the path to its fulfilment. The artful alignment Schmitt draws between direct democracy and authoritarian governance reflects the intense polarisation now evident within his perspective. For at the other extreme lies his polemical demonisation of its indirect equivalent, stigmatised indelibly by connotations of party-based pluralism.

Once more, however, Schmitt must contrive to circumvent the circularity intrinsic to his repressive formulation. Only through the process of seamless identification between ruler and ruled and the direct form of representation that flows from it, is the unity of the people’s political will supposedly forged.⁹⁷⁴ More precisely, it is ‘*representation [that] first establishes this unity*’.⁹⁷⁵ This denotes the dependence of the politically unified will on the process through which this will is expressed. Without a sovereign leader, unity does not begin to exist. But equally, does not Schmitt depict the ruler as the representative of a popular will, already inexplicably coagulated into a unitary legitimising force?

⁹⁷¹ *Supra*: Schmitt *Constitutional Theory*, 300.

⁹⁷² *Supra*: Heller ‘The Essence and Structure of the State’, 265, 273.

⁹⁷³ See *ibid*: 265, 274 where Heller implicitly draws attention to the controversial nature of Schmitt’s formulation: ‘One may not deny that the localisation principle of ruler sovereignty exhibits a concentration of state power in the hands of the autocrat that is completely unknown to democracy and state based on the rule of law’.

⁹⁷⁴ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 118: ‘To Schmitt, democracy was a political form, a will free from contradiction and unified in a single person (a representative) speaking with the voice of the people’.

⁹⁷⁵ *Supra*: Schmitt *Constitutional Theory*, 247.

‘Sovereignty stems from the personal authority embodied in a ruler; sovereignty is tied to the political; the sovereign brings about the political unity of a people; personalist representation therefore brings about political unity. Once again, the circularity of his argument is noticeable....Only the figure of the sovereign could properly represent the political unity of a people. Such unity was brought about through the idea of an interrelationship between the constituent power of the people and political representation properly conceived – a tense relationship whose implications are still much debated in contemporary political theory.’⁹⁷⁶

Such illogic aside, one step remains. Schmitt must conflate the two categories before him: that of the people’s will and sovereign *voluntas*, each perceived equally transcendent over constitutional norms.⁹⁷⁷ This, he achieves by recourse to his reworked principle of identity and contempt for pluralistic methods of indirect representation.⁹⁷⁸ To Schmitt, no one save ‘*the figure of the sovereign would be capable of representing the state as the political unity of a people*’.⁹⁷⁹ Contextualised within the Weimar Republic, this occurs when ‘the people’ selects its president in direct election.⁹⁸⁰ What Schmitt advocates is ‘*executive democracy*’⁹⁸¹ with a theatrical twist; governance where ‘*the masses are imbued with confidence that infuses the measures of the leader with an amorphous legitimacy regardless of their practical content*’.⁹⁸² Especially significant within the state of exception, it is the president alone who personifies and truly

⁹⁷⁶ *Supra*: Kelly ‘Carl Schmitt’s Theory of Representation’, 132.

⁹⁷⁷ On this point, see *supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 116: ‘the condition for Schmitt’s employment of constituent power as a surrogate for sovereignty was a shift in his conception of the latter. Hard decisionism and personalism meant that only monarchs could be the subject of sovereignty.’ Cristi posits that *CT* marked a shift away from hard decisionism and personalism and towards a new conception of sovereignty. However, it is arguable that Schmitt’s lionisation of presidential authority, within Article 48, undermines Cristi’s assertion.

⁹⁷⁸ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 95: ‘The unlimited power of the sovereign people can never be fully identified with the limited legal power of the bodies within a constitution to represent the people’.

⁹⁷⁹ *Supra*: Kelly ‘Carl Schmitt’s Theory of Representation’, 113-134, 127.

⁹⁸⁰ *Supra*: Schmitt *Constitutional Theory*, 294; *ibid*: 369: here, Schmitt likens the introduction of the presidential system to direct democracy at work specifically in the Article 25 authority to dissolve the Reichstag or, under Article 75, by ordering a referendum in opposition to the Reichstag’s statute-making decision. This provides the president with an opportunity to direct an appeal to the people and to produce a direct connection with the enfranchised state citizens against the Parliament; *cf. supra*: Thoma ‘The Reich as a Democracy’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink, 157, 164: ‘The German Republic is a democracy ruled predominantly indirectly, that is, through representation through Parliament. At the same time, it is a democracy that separates powers in a genuine way and balances the national parliament with a whole system of counterweights’.

⁹⁸¹ See *supra*: Seitzer *Introduction to Constitutional Theory*, 40: ‘Schmitt claims that the conditions of legitimate democratic governance are best maintained by systems that do not conform to standard conceptions of democracy. Further, democracy must be executive democracy. Political parties just serve to fragment the united political or “democratic” will’.

⁹⁸² *Supra*: Shapiro *Carl Schmitt and the Intensification of Politics*, 58; see also *supra*: Kalyvas *Democracy and the Politics of the Extraordinary Max Weber, Carl Schmitt and Hannah Arendt*, 125, where Kalyvas highlights this ultimate weakness within Schmitt’s democratic theory: ‘By levelling constituent politics to a speechless applause and by silencing the people, Schmitt undermined the very same grounds of his theory of the extraordinary’.

represents the people's politically unified will; a '*popular will which cannot be procedurally ascertained in a time of crisis*'.⁹⁸³ If then 'the people', as the *pouvoir constituant* in whose name the executive exercises power, enjoys supra-normative status so too does the president.⁹⁸⁴

Here lies the momentous assimilation of plebiscitary democracy with dictatorship.⁹⁸⁵ Once the president, as quasi-dictator, dons the mantle of the Schmittian *pouvoir constituant*, no legal-constitutional constraints serve to delimit the supreme presidential authority that ensues.⁹⁸⁶ The people and, therefore, by extension the president '*act as sovereign above and beyond the statutorily mandated jurisdiction*'.⁹⁸⁷ What Scheuerman terms the '*originary arbitrariness*' of the people's constituting force - now transposed in its entirety to the president - holds sway over all '*anti-political normativities*'.⁹⁸⁸ Crucial, therefore, is not whether the president exercises power nominally '*on commission*'⁹⁸⁹ from the people, or as one, through identification with the people. Within the state of exception - its instigation, duration and cessation all respectively determinable by the president - legal constitutional norms must yield, on demand, to the vagaries of whatever executive discretion ostensibly reflects the popular will. As such, '*what is to prevent an authoritarian stand-in for the pouvoir constituant from altering or abrogating laws at will?*'⁹⁹⁰ The latitude reposed in the ruler for *ad hoc* decision-making appears to render expendable the self-vaunted liberal legal-positivist ideals of certitude, predictability and procedural rectitude within the law, all for Schmitt immured within a formalised vacuum. However plausibly *CT* appears to signify recognition that a system of institutional safeguards is indispensable to any workable

⁹⁸³ *Supra*: Scheuerman *The End of Law*, 34.

⁹⁸⁴ *Supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 124: 'An absolute form of government, monarchical or democratic, implied a sovereign prince or a sovereign people who stood *legibus solutus*, above the law'.

⁹⁸⁵ Horst Drier *The Essence of democracy – Hans Kelsen and Carl Schmitt Juxtaposed* in Hans Kelsen and Carl Schmitt A Juxtaposition ed. D.Diner/M Stolleis (Gerlingen: Bleicher Verlag, 1999), 71, 76: 'In summary, when Schmitt speaks of a democratic public, he does not refer to a marketplace of ideas with its critical exchange of points of view. Instead, he thinks of the collective acclamation by a mass of people. Where Schmitt criticises the electoral system as void of all meaning, he does not advocate direct democracy by referendum or stronger control of representatives. Rather, he wants to abolish decision-making by ballot. When Carl Schmitt calls for rights and true democracy, it excludes a parliamentary system but it does not exclude dictatorship'.

⁹⁸⁶ *Supra*: Scheuerman *The End of Law*, 73.

⁹⁸⁷ *Supra*: Schmitt *Constitutional Theory*, 295.

⁹⁸⁸ *Supra*: Scheuerman *The End of Law*, 73.

⁹⁸⁹ *Supra*: Schmitt *Constitutional Theory*, 110.

⁹⁹⁰ *Supra*: Scheuerman *The End of Law*, 73.

legal-constitutional regime, nowhere does this equate to collateral acceptance of the inherent validity of a governmental model, wholly predicated upon the rule of law.⁹⁹¹

Of this, Schmitt is in no doubt:

‘It is the distinctly liberal, Rechtsstaat component, which linked itself with the democratic element of a constitution that leads to a weakening and softening of the power of the state by a system of controls and restrictions. This tendency is not essential to a democracy as a political form; it is perhaps even foreign to it. A dictatorship is possible only on a democratic foundation while for this reason it already contradicts the principles of liberal legality because it is part of dictatorship that no factually defined, generally legislated competence is provided to the dictator. Instead the scope and content of his *empowerment* are dependent on his *discretion*, so that there is not a jurisdiction in the Rechtsstaat.’⁹⁹²

Against legal positivism, once Schmitt reiterates the imperative of founding the legal order on decisions, not norms and, in *CT*, of attributing these decisions to the will of a sovereign people – embodied within the president - the scene is set for its devastating application to Article 48(2):⁹⁹³

‘Article 48(2) enabled the return of the state as substance in the form of the unbound executive which would be able to act apart from the pernicious influence of interest groups in the *Reichstag*.’⁹⁹⁴

⁹⁹¹ See *supra*: Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 264, n.19 where Scheuerman refers to Schmitt’s idea of democratic dictatorship as an irresponsible myth.

⁹⁹² *Supra*: Schmitt *Constitutional Theory*, 266.

⁹⁹³ *Supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 120: Schmitt’s definition of constituent power ‘reveals Schmitt’s rejection of juridical normativism taken to extremes by neo-Kantians like Kelsen. The foundations of a constitution were existential. A constitution could rest only on a concrete sovereign will and not on an abstract norm. In no way was the *constituant* exhausted within the positive constitution itself. The sovereign constituent will, configured juridically as constituent power, continued to exist outside and above the constitution’; cf. *supra*: Heller ‘The Essence and Structure of the State’ in *Weimar A Jurisprudence of Crisis*, 265, 277: ‘The claim is utterly false that the ‘positive’ constitution is not a norm and not a statute but a ‘solitary decision’ or as Schmitt says elsewhere a plurality of ‘concrete decisions’ and that constitutional statutes were valid only in the sense of such a decision or decisions’.

⁹⁹⁴ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 230.

The positive concept of the constitution and Article 48

Sacrosanct, as seen, from a positivist perspective is the written text of the constitution. Even within a state of 'exception', presidential authority to suspend its provisions remains bounded by the specific constraints Article 48 enumerates. Irrespective of the gravity of the prevailing emergency, no other articles within the Weimar Constitution are capable of suspension. Any contrary position heralds subversion of the rule of law. This, legal positivists, will not allow. A situational interpretation of constitutional law that purports to permit executive *suspension*, or worse still, *abrogation* of textually enshrined provisions virtually at will is, therefore, untenable.⁹⁹⁵ What, in contrast, Schmitt deplors is any construal of the constitution sullied by the taint of formalism and relativism.⁹⁹⁶ Preservation of the people's will, within the state of exception, is the lifeblood of Article 48. It is the existential essence and promulgation of this politically unified will that infuses the presidential office with the authority to disregard individual constitutional 'laws'.⁹⁹⁷ Only then may the 'positive constitution' truly survive. Potentially fatal to this overriding objective is the '*often discussed, uncritically adopted confusion of the constitution in the actual sense with every single constitutional provision*':⁹⁹⁸

'Protection of the constitution and protection of every single constitutional provision are no more identical with each other than are the inviolability of the constitution and every single constitutional provision. When every single constitutional provision becomes "inviolable", even in regard to the powers of the state of exception, the protection of the constitution in the positive and substantial sense becomes sacrificed to the protection of the constitution in a formal and relative sense. The purpose of Article 48(2) is perverted to its opposite. Specifically, the constitution is not "inviolable"; just the individual constitutional provision is. In other words, the individual constitutional provision is an insurmountable obstacle to an effective defence of the constitution.'⁹⁹⁹

⁹⁹⁵ *Supra*: Caldwell *Carl Schmitt and Authoritarian Liberalism*, 173.

⁹⁹⁶ *Supra*: Cristi *Carl Schmitt and Authoritarian Liberalism*, 124-5: '...the purpose of the liberal ideal was, according to Schmitt, to subject the power of the state to the rule of law and expel sovereignty from its domain. For Schmitt, this ideal of absolute normativity constituted a tenuous fiction. The political and the state could be erased by legal fabrications and methods of avoidance. Acts of sovereignty would always occur. But "these acts of inevitable sovereignty" (Schmitt, 1928: 108) were better justified when they could be seen as grounded in the constituent power of the people'.

⁹⁹⁷ *Supra*: Mc Cormick *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, 142-143: 'This strategy of justifying presidential action on the basis of the pre-constitutional will of the people and not the principles embodied within the constitution itself becomes more pronounced after Schmitt formulates his constitutional theory in his 1928 *Constitutional Theory*'.

⁹⁹⁸ *Supra*: Schmitt *Constitutional Theory*, 158.

⁹⁹⁹ *Ibid.*

Dripping with derision, this passage encapsulates what Schmitt perceives the tragic misconception intrinsic to legal positivism and the liberal-bourgeois *Rechtstaat* it engenders. Even in the face of the direst emergency, each provision within the textual constitution is impregnable. Only following precise adherence to the letter of the ‘law’ is amendment to any given constitutional clause permitted. Civil order may collapse; the state may disintegrate into a condition of abject disarray but still the constitution and the procedures it ordains are pre-eminent. No account is to be borne of the emergence or extent of any exigent circumstances that confront the people and warrant a commensurate response. This, to Schmitt, is nonsensical. How is it feasible to fulfil the politically unified will of ‘the people’ by consigning its author to oblivion? Article 48 comprises an essential failsafe to preserve the existential integrity of the people; its fruition rests not on normative delimitation but on supra-normative leeway.

The sole purpose of the opening words ‘*for this purpose*’ within Article 48 is to identify the precise Articles within the Constitution capable of suspension *if* - and only if - the President chooses to act as the provision explicitly prescribes.¹⁰⁰⁰ But nothing within it prevents the president from opting for the propagation of *any* measures necessary to deal efficaciously with the exigencies of the concrete emergency. This need not entail suspension of specific elements within the constitution. According to Dyzenhaus’ account, ‘*these measures do not suspend those constitutional provisions they ignore, violate or offend. The validity of constitutional norms continues*’.¹⁰⁰¹ On this basis, 48(2) vests in the President a supervening right to wield almost unlimited authority if such measures are justified in any given factual circumstances; in essence, to uphold not the formal but the positive constitution. For the duration of presidential supremacy, the textual constitution continues unadulterated whilst the norms within it are simply disregarded at will.

Ultimately accessible, to Schmitt is the ammunition required to launch his fateful salvo against the bedrock of positivism: the textual constitution, understood in the sense of an

¹⁰⁰⁰ ‘*Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Rechtsverfassung*’, published as an Appendix to *Die Diktatur* (1924 ed.), 216ff in *supra*: Schwab *The Challenge of the Exception*, 39.

¹⁰⁰¹ *Supra*: Dyzenhaus *Legality and Legitimacy*, 72ff.

amalgam of enshrined legal norms.¹⁰⁰² From his standpoint, administration of the *coup de grace* is unproblematic:

- The politically unified will of the people exists anterior to the state: ‘*that the constitution establishes itself is nonsensical. The constitution is valid by reason of the existing political will that establishes it. Every type of norm, even constitutional laws, presupposes that such a will already exists*’¹⁰⁰³
- Because the people’s will is supra-normative and possesses mythical properties,¹⁰⁰⁴ ‘*it can only be made evident through the act itself and not through observation of a normatively regulated process. Self-evidently therefore, it can also not be judged by prior constitutional laws or those that were valid until then*’¹⁰⁰⁵
- To preserve its own existence, it is ‘the people’ that must make the critical decision upon the friend/enemy dichotomy¹⁰⁰⁶
- To this end and in exercise of a constitution-making power that ‘*is omnipotent, inalienable and indivisible*’¹⁰⁰⁷ and which ‘*remains always present dependent upon the circumstances*’,¹⁰⁰⁸ the German ‘people’ chose to give itself the 1919 Reich Constitution¹⁰⁰⁹
- In consequence, the Weimar Republic rests upon a genuinely democratic and, therefore, political theory of law¹⁰¹⁰
- The Constitution provides for a democratically elected president¹⁰¹¹
- Through the perfect identity between people and president, the president embodies the vibrant, unitary and indivisible will of the people and is synonymous with it
- The authority of the president binds itself immediately with the political total will of the German nation
- As such, the president is guardian and protector of the constitutional unity and totality of the German people: the Guardian of the Constitution¹⁰¹²

¹⁰⁰² See *supra*: Dyzenhaus, ‘Now the Machine Runs itself’, 1-19.

‘Liberals cannot make the move to absolutism. It is too circumscribed by the constitution and its commitment to relativism. Schmitt wants to make the move from relativism to absolutism by means of infallible dictatorship’

¹⁰⁰³ *Supra*: Schmitt *Constitutional Theory*, 76.

¹⁰⁰⁴ See *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against Politics as Technology*, 115, where Mc.Cormick condemns Schmitt’s resort to myth as a new religiosity that seeks to make meaning through the manufacture of myth; *ibid*: 116 which highlights that in Schmitt’s reliance on myth, movement is everything and goal nothing.

¹⁰⁰⁵ *Supra*: Schmitt *Constitutional Theory*, 131.

¹⁰⁰⁶ *Ibid*: 247 where Schmitt, in clarification of the principle of identity, speaks of establishment of self-identity of the then existing people as a political unity, ‘if, by virtue of its own political consciousness and national will, it has the capacity to decide between friend and enemy’.

¹⁰⁰⁷ *Supra*: Scheuerman *The End of Law*, 70.

¹⁰⁰⁸ *Supra*: Schmitt *Constitutional Theory*, 140.

¹⁰⁰⁹ Article 1 Reich Constitution 1919; Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff: University of Wales Press, 1988), 114: ‘The constitution did not descend from heaven ready-made but owed its existence to a decision from the German people...In 1919, a sovereign people had decided to confirm its national identity and define the mode of its political existence by means of a constitution. This was the absolute decision on which now stood a now relativised positive constitution. The idea of absolute monarchy, as the sole subject of sovereignty had perished in 1918 but absolute democracy, supported by the *pouvoir constituant* of the people, had replaced it’.

¹⁰¹⁰ *Supra*: Schmitt *Constitutional Theory*, 286.

¹⁰¹¹ Article 41.

¹⁰¹² *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 230, n.156, citing Schmitt’s *Guardian of the Constitution*, 159; *ibid*: 115, ‘Schmitt’s theory of a positive constitution asserted that the president was the representative of a collective will and the embodiment of the nation’; note that at this stage Schmitt was also prepared to entertain the possibility of an ‘upper house’ as Guardian of the Constitution, that is, as court of law to resolve constitutional disputes and to act as an

- *In concreto*, it is the president who makes all decisions relevant to the existential survival of the people
- Textual constitutional circumscription of the will of the people (or, by extension, the president) is impossible¹⁰¹³
- In circumstances where the constitutional text is inadequate to cater for the exigencies of the concrete situation, it is the will of the people, as personified in the president, that determines when and how these gaps are to be addressed¹⁰¹⁴
- If the president is efficaciously to fulfil the people's will, the president must possess the requisite authority to disregard provisions within the text of the constitution (Schmitt takes no account here of the president's foresworn constitutional obligation, under Article 42, to respect all 'laws')¹⁰¹⁵
- This mandates the president to detect and comply with a potentially non-textual and hitherto unarticulated 'positive constitution' that encapsulates the unassailable will of the people; a constitution that transcends '*the liberal emphasis on the act of positivisation, of written expression; an act which is exhausted in the certification of a formal text*'¹⁰¹⁶

This positive concept of the constitution - so designated not for its positivist connotations but in antithesis to '*natural or unwritten*',¹⁰¹⁷ - Schmitt proceeds to concretise in the awesome authority he wrings from Article 48 for the president to override constitutional 'laws', whenever politically expedient:¹⁰¹⁸

'The potentially perpetual and abrogating quality of the executive action that Schmitt describes purportedly does not violate this standard because he presents it as maintaining consistency with a constitutional a priori: the initial democratic will or spirit of the document.'¹⁰¹⁹

Irrespective of any procedural safeguards within the Weimar Constitution to preclude arbitrary suspension, revocation or disregard of provisions within it, no such normative

organ for decisions on the constitutionality of statutes and decrees and for constitutional complaints. On this point, see *supra*: Schmitt *Constitutional Theory*, 326. As will emerge *infra*, the concession as to the possibility of a Supreme Court was short-lived. See Chapter 4 for a further discussion of Guardian of the Constitution.

¹⁰¹³ For the diametrically opposing stance adopted by positivism, see discussion in *supra*: Dyzenhaus 'Now the Machine Runs itself', 1-19: 'In positivism, the law's contents must be determinable and identifiable by factual texts which do not involve controversial moral-evaluative arguments'.

¹⁰¹⁴ *Supra*: Dyzenhaus *Legality and Legitimacy*, 53.

¹⁰¹⁵ Article 42: The Reich President shall, on assuming office, take the following oath before the Reichstag. I swear to devote my energies to the well-being of the German people, to further their interests, to protect them from injury, to keep the Constitution and the laws of the Reich, to fulfil my duties conscientiously and to administer justice to all.

¹⁰¹⁶ *Supra*: Dyzenhaus *Legality and Legitimacy*, 53.

¹⁰¹⁷ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000), 96.

¹⁰¹⁸ See *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 171: 'Article 48 was in Schmitt's analysis, the real basis for democracy. Neither judiciary nor constitution articles should limit presidential emergency power'; *ibid*: 172: 'Schmitt allowed Article 48 to create a second constitution for extraordinary times that could take precedence over the remainder of the written constitution'.

¹⁰¹⁹ *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxxviii.

device is able to shackle this presidential discretion.¹⁰²⁰ Paramount, to Schmitt, is that through the homogeneity of the people, the identity this engenders and the ensuing manifestation of the people's will via the president, 'the *'governed actually govern themselves'*'.¹⁰²¹ If violation of constitutional norms is what is needed to fulfil the will of the people - crystallised as it is at the moment of mass acclamation¹⁰²² - such infringement is not only permissible but mandatory. Provided the president never flouts the collective decision of the people in favour of a particular state-form, no element of the textual constitution is immune from contravention.¹⁰²³ This means, for example, that Article 116 - the legal constitutional embargo on the retrospective imposition of punitive sanctions - is as susceptible to infraction as the remainder of the textual constitution. Conversely, *'what Schmitt called the absolute constitution could not simply be changed by constituted powers'*.¹⁰²⁴

No longer does it matter whether Schmitt advocates sovereign or commissarial dictatorship. For once *'a second constitution'*¹⁰²⁵ - perceived as durable and vibrant - hovers above and potentially against the written constitution, a dictator/president duty-bound to uphold it never forfeits the right to commissarial designation. What this implies, however, is that the same Schmitt who condemns liberals' relativisation of *segments* of the constitution is prepared,¹⁰²⁶ where expedient, to relativise - or disregard - the *whole* of it. In contrast to his determination to preserve the positive (but essentially hypothetical) constitution, entirely expendable during the arbitrarily determined state of exception is its textual counterpart.¹⁰²⁷

¹⁰²⁰ See *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 113: 'In advocating presidential power, Schmitt argued that the Weimar Constitution was democratic and therefore opposed to liberalism. Democracy was the unity of nation and state: the *Reichstag* was the threat against which the constitution had to be guarded. Parliament imperilled the real constitution'.

¹⁰²¹ *Supra*: Schmitt *Constitutional Theory*, 264.

¹⁰²² *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 96: 'Schmitt wanted to capture in freeze frame the moment of decision (the founding of the constitution) when the collective will made a brief shimmering appearance'

¹⁰²³ *Ibid*: 95: 'The will of the people is anterior to any constitution and no constitution can be considered a definitive form of this popular will. The existence and intrinsic legitimating authority of the people is partially outside any written scheme of norms'.

¹⁰²⁴ *Supra*: Muller *A Dangerous Mind*, 30.

¹⁰²⁵ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 172.

¹⁰²⁶ See *supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 42: Mc. Cormick states that according to Schmitt, too much relativism and neutralisation leads to a loss in moral guidance.

¹⁰²⁷ See *ibid*: 115: 'Schmitt's theory of the positive constitution asserted that the president was the representative of a collective will and the embodiment of the nation'.

‘Schmitt’s positive concept of the constitution means that Schmitt, who subordinates the judicial and legislative, can effectively ignore the constitution without literally destroying it. As such, he can claim disingenuously to promote a commissarial dictatorship.’¹⁰²⁸

Here lies the thrust of Schmitt’s proposed constitutional remedy to the crippling malaise of Weimar Germany, the resurgence of which he fears even during his least caustic phases. Sovereign dictatorship, that is, the authority to abrogate the constitution and install another in its place, becomes otiose when its commissarial equivalent is no less effective. Not without foundation, therefore, is the critique that ‘*Schmitt’s poison is so deadly precisely because it initially may not taste like poison.*’¹⁰²⁹ Never are legal-constitutional norms, located within the textual constitution able to fetter a leader whose claim to legitimacy rests upon the mythically imbued, politically unified will of a homogenous people. A will, with the capacity to engender and infuse a supra-normative constitution, gossamer-thin, yet awash with potential for expedient manipulation:

‘In the end, Schmitt preserved the basic organisational structure of the system only by draining them of any substance, making his constitutional theory the constitutional politics equivalent of a neutron bomb which destroys life but leaves untouched the structures that house it.’¹⁰³⁰

¹⁰²⁸ *Ibid*: 144.

¹⁰²⁹ *Supra*: Scheuerman *The End of Law*, 166.

¹⁰³⁰ *Supra*: Seitzer ‘Carl Schmitt’s Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis’, 203-224; see also *supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxxviii: ‘Schmitt’s attempt to pass off a constitution abrogating emergency dictatorship as a constitution preserving one shows the transformation of a dictatorship from a temporary task-specific constitutional practice to the modern phenomenon represented by the example of a junta’.

The people's will in decline

Rarely again does elevation of the people's will assume the significance Schmitt reserves for it in *CT*. Pending the 1933 demise of the Republic, 'the people', as *pouvoir constituant*, gradually recedes in favour of a less camouflaged veneration of unadulterated sovereign authority.¹⁰³¹ A momentary digression, beyond Weimar, reveals that this is only the beginning of Schmitt's incremental disenchantment with the mythologised will he promulgates. For with the advent of the Nazi regime, Schmitt consigns the people to a multitude living in the shadows under the protection of the decisions reached by party and state.¹⁰³² As the primacy of the president evaporates in face of the 'leader principle' instigated by the Third Reich,¹⁰³³ the people become superfluous.¹⁰³⁴ 'Obliterated in substance', popular sovereignty and its manifestation via the asserted validity it confers upon presidential office, is 'simultaneously transvalued into a symbolic code of total domination'.¹⁰³⁵ A role is nominally retained for the plebiscite to override laws and measures but this is an empty device. For immediately thereafter, the political leader can arbitrarily determine the specific form in which to introduce and implement a new measure or law, in contravention of the previously expressed will of the people.¹⁰³⁶ During the 1930s, this trend towards scepticism, indeed repudiation of unified popular sovereignty as the 'ultimate author and subject of a legal order',¹⁰³⁷ gradually gathers momentum:¹⁰³⁸

¹⁰³¹ See for example *supra*: Schmitt *Legality and Legitimacy*, 40, 45.

¹⁰³² See Carl Schmitt *Staat, Bewegung, Volk* (Hamburg, 1933), cited *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 185.

¹⁰³³ See *supra*: Schwab *The Challenge of the Exception*, 207 where Schwab explains that by *Staat, Bewegung, Volk* (Hamburg, 1933), 9-10, Schmitt had been forced to concede that the president had been relegated to a figurehead who reigns but does not govern. Power had been relinquished to Hitler, both in a *de facto* and *de iure* sense; see also *supra*: Schmitt *Legality and Legitimacy*, 147, n.1: 'The Enabling Act of March 1934 displaced democratic institutions and introduced permanent constitutional changes, specifically the leadership principle as a governmental form'.

¹⁰³⁴ Although Schmitt relegated the role of the people's will, perhaps in a move to ingratiate himself with the Nazis, his volte-face had the opposite result. The Nazis wished to retain at least the facade of a popular Volkish appeal and Schmitt quickly had to moderate his theoretical subjugation of the people.

¹⁰³⁵ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 185.

¹⁰³⁶ *Supra*: Schwab *The Challenge of the Exception*, 113: 'Everything really depended on the Fuhrer's decision whether to permit or prohibit the participation of the amorphous masses in approving or rejecting certain measures or laws....Once a decision has been made, the people recede to the background until again called upon to decide basic constitutional norms or political acts'. It is difficult to see why Schmitt should have been surprised by this development, given his earlier manipulation of the plebiscite to bolster his own constitutional theory.

¹⁰³⁷ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195.

¹⁰³⁸ On Schmitt's perception of the legitimacy of Nazi law, see *supra*: Kalyvas *Democracy and the Politics of the Extraordinary Max Weber, Carl Schmitt and Hannah Arendt*, 114, in which, drawing on the procedural steps extrapolated by Andrew Arato in his 'Forms of Constitution Making and Theories of Democracy', Kalyvas asserts that 'from the perspective of Schmitt's definition of sovereignty as the

‘In *On Three Types of Juristic Thought*, Schmitt tacitly acknowledges that the popular will and indeed any decisionist hypostatisation of the will could be just as hypothetical or un-concrete a concept as Kelsen’s Basic Law.’¹⁰³⁹

Evident in *On Three Types of Juristic Thought (1934)*¹⁰⁴⁰ and, more prominently, in *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (1950)*,¹⁰⁴¹ plebiscitary imbued dictatorship loses all appeal for Schmitt. Divergent in rationale, though paradoxically similar in outcome to his early-Weimar perspective, his Nazi-era theoretical position displays scant residual allegiance to the utility of the people’s will. Localisation of power within the *demos*, as instantiated through a democratic state model, becomes redundant.¹⁰⁴²

Conversely, a regression in time here to *Legality and Legitimacy (1932) (LL)*,¹⁰⁴³ illustrates how a vestigial fascination with the potentiality of the people’s will lingers, if in an attenuated form, to the end of the Republic.¹⁰⁴⁴ The value of ‘the people’, Schmitt still recognises in its ‘*uncommunicative directness and emotionality*’.¹⁰⁴⁵ Significant, however, is the extent to which exploitation of the unified will of the people to found and buttress Schmitt’s democratic framework seems interlaced with the degree of political stability he encounters. Akin to a parabolic curve with its apex in *CT* and its

constituent power of the popular will, the Nazi state could never have qualified as a new legitimate legal order based on an act of the people’. In so doing, Kalyvas seeks, however, to apply to the Nazi era, one possible interpretation of the 1928 theoretical position he claims that Schmitt expresses in *CT*, without taking into account of the counterarguments discussed above and the intervening shift in Schmitt’s stance articulated *inter alia* in his *LL* and *Staat, Bewegung, Volk*.

¹⁰³⁹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 185.

¹⁰⁴⁰ *Supra*: Schmitt *On the Three Types of Juristic Thought*.

¹⁰⁴¹ Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Ltd, 1950).

¹⁰⁴² At this stage (1934), Schmitt was expounding his concrete order theory as a foundation for the legal order: see *infra*: Chapter 4.

¹⁰⁴³ *Supra*: Schmitt *Legality and Legitimacy*.

¹⁰⁴⁴ See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 161: ‘By *Legality and Legitimacy*, in 1932, Schmitt’s claim that the bourgeois rights section had to take precedence over the procedural section of the Weimar Constitution in which the collective will of the people was organised, implied that popular sovereignty was not the ultimate source of the Constitution’s legitimacy’; significantly, however, Schmitt maintains his distrust of liberal-parliamentary pluralism, whilst advocating the concept of plebiscitary legitimacy. His dependence on the will of the people may be more ambiguous than in *CT* but even during the final stages of the Weimar Republic, is still very pronounced. See for example *supra*: Schmitt, *Legality and Legitimacy*, 72: ‘Parliament is to Schmitt a compromise of the thoroughly heterogeneous power organisations – a showpiece of the pluralist system. Parties in the pluralist system seek legality but encounter plebiscitary legitimacy’; *supra*: Mc.Cormick, *Introduction to Legality and Legitimacy*, xv: ‘Schmitt oscillates between an insistence on the homogeneous concrete will of the *demos* that pre-exists and takes priority over legal or constitutional arrangements or a purely formalistic apparatus as law which does not take into account the moral-practical reason institutionalised in and carried out by legal procedures’.

¹⁰⁴⁵ *Supra*: Schmitt *Legality and Legitimacy*, 64.

nadir in early and late Weimar, the more tranquil the moment, the greater the propensity to harness the ‘people’s will’ as a wellspring of legitimacy. But moderate though *CT* may appear, within it still lurks a potent fuse awaiting ignition; a constitutional theory that vindicates normatively unconstrained action in the exception. An ostensible engagement with the institutional bastions of liberalism enables Schmitt to fashion what, is to classic liberal constitutionalists, an unpalatable alternative: the capacity for unbounded executive power concealed within a seductively, innocuous facade.

What follows is explication from a legal-constitutional perspective of the Republic’s denouement and Schmitt’s construal of it. In this resides his lacerating critique of the defects he discerns within liberal governance and ideology. As his chequered passage through the turbulence of Weimar Germany draws to a close, it is with the vituperative assault Schmitt launches against liberalism; value-neutral positivism and the principle of equal chance entwined within it that the next segment grapples. This is the final strand in the Schmittian skein before the dark clouds of National Socialism descend.

‘The wherefore’: the apogee of Schmitt’s anti-liberal invective

‘A mine that explodes silently. One watches how magically the wreckage comes in and destruction done before anyone knows it.’¹⁰⁴⁶

Introduction

As seen in the previous segment, intrinsic to Schmittian theory is the empowerment of the president/dictator, under Article 48, to volitionally override pre-established legal norms. This, Schmitt partially achieves through a sporadic intensification of the people’s will with its concomitant elevation over the textual constitution. In turn, this provides adequate weaponry potentially to eradicate an entire legal order. To what extent, however, does Weimar’s 1933 downfall rest upon the wide-ranging presidential authority that Schmitt seeks to locate within Article 48? Is it his conceptualisation of a *positive constitution* and the discretionary latitude this accords the president/dictator that culminate in demolition of Germany’s brief dalliance with principles of liberal government? Or do the Nazis attain power not through violation of the textual constitution - as a Schmittian interpretation of Article 48 ostensibly permits – but by instrumentalisation of it? Why the legal-constitutional *Rechtsstaat* is unable to mount an effective defence to forces potentially inimical to it and whether the inherent deficiencies Schmitt is keen to highlight within the Weimar Constitution contribute to its vulnerability are, therefore fundamental. In short, is the Constitution ultimately the instrument of its own demise and does Schmitt’s critique have wider implications for the viability of the liberal state under siege? If so, what insights does this lend into the strategy the Allied nations deployed at Nuremberg and the legitimacy of proceedings forever inescapably tainted with allegations of retrospectivity?

¹⁰⁴⁶ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 34; Muller draws here upon Junger’s assessment of the Schmittian critique of liberalism.

Who guards the constitution?

To unravel this conundrum invites a diversion into the methodology Schmitt advocates to alleviate the escalating state of chaos, endemic within Germany, at the onset of the 1930s. Desperate to salvage order from the raging social, economic and political turbulence, who does Schmitt consider equipped to address the challenges the concrete situation engenders? During this phase, highly-charged methodological exchanges were to pass between Schmitt and Hans Kelsen as to which institution was best fitted to safeguard the constitution and, by extension, the Republic itself.¹⁰⁴⁷ What, in Schmitt's view, was indispensable was an entity perfectly tuned to the spirit of the *Volk*; one dedicated to the conservation of civil order. If entrusted to the auspices of the Supreme Court that Kelsen favoured, this would remain elusive. Differentiation between what was congenial or inimical to the political unity of the state was a responsibility to which a judicature could never be equal.¹⁰⁴⁸ The president alone - devoted to preservation of all that was quintessential to the constitutional order and neutral only in the sense of his independence from party politics - was able to guard the constitution. No one save the president could ever aspire to be a true bearer of *the political*:

'For the political unity of a state to be preserved and realised, an encompassing point of reference is needed which itself must be willing and able to achieve agreement and integration of conflicting and antagonistic interests. This is the task and role of the *pouvoir neutre*..... In his book *Der Hüter der Verfassung*, Schmitt looks for such a *pouvoir neutre* which he finally finds (within the Weimar state) in the public service and in the Reich's president.'¹⁰⁴⁹

If it is the president who encapsulates what is essential to the preservation of the constitutional order, visited in the next segment is the contrasting rationale Schmitt deploys in his repudiation of a juristic solution.¹⁰⁵⁰ Deserving of brief mention here,

¹⁰⁴⁷ On this dispute, see inter alia Ernst Wolfgang Bockenforde 'A key to Understanding Carl Schmitt's Constitutional Theory' in *Law as Politics* ed. David Dyzenhaus (Durham and London: Duke University Press, 1998), 45-49; *supra*: Paulson 'Classical Legal Positivism at Nuremberg', 132-158; *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 141 drawing on Schmitt's analysis in *Der Hüter der Verfassung*: 'Laws could not be nullified by a constitutional court because the content of a piece of legislation was not bound to and could not be derived from a constitution in the way that a judicial decision can and should be derived from a law'.

¹⁰⁴⁸ See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 13: 'Most normativist legal theorists adhered strictly to the concept of legal and political neutrality - they favoured a legal approach to the crisis of the Weimar Constitution in which the Supreme Court would render the ultimate decision regarding the validity of a political party'.

¹⁰⁴⁹ *Supra*: Bockenforde 'A key to Understanding Carl Schmitt's Constitutional Theory', 48-49.

¹⁰⁵⁰ See the account of Schmitt's *Guardian of the Constitution* in *supra*: Scheuerman *The End of Law*, 67: 'A constitutional court will not guarantee political stability in the Weimar republic. Judicial devices become so politicised (that is, are an unmediated battleground for warring existentially opposed political entities) that they can no longer claim to embody legalistic concepts of neutrality or equality before the

however, are the uncharacteristically legal-scientific arguments and selectively formalistic stance Schmitt adopts in his rejection of a solution founded upon judicial review of the legality of political parties, as a counterweight to legislative authority.¹⁰⁵¹ For this appears to conflict with his more typical demolition of the positivistic adherence to strict formality that he detects within the liberal *Rechtsstaat*. Startlingly strategic is the implicit ambivalence within these perspectives: the one, an ostensible embrace of formalism signified by a new-found suspicion of judicial discretion; the other, a scathing denigration of the formalistic tendencies emblematic of liberal governance. The more so when Schmitt combines this polemical stance against *formal legality*, with his *deformalised* interpretation of the textual constitution and the attendant irrational glorification of untrammelled presidential discretion within the exception. Vital here is the dichotomy Schmitt extrapolates between normative strictures on the exercise of *power* - deemed inseparable from the legal-positivist tradition - and the unconstrained latitude he seeks to vest in the president. It is this disparity between the decisionist valorisation of presidential authority and its anaemic liberal-positivist converse that encapsulates the golden and iron threads so deftly woven by Schmitt at the spindle of his Weimar skein. Condensed below are these themes in their crowning configuration.

law'; also *supra*: Schwab *The Challenge of the Exception*, 81 where Schwab posits that, for Schmitt, it is misguided to require deference to a Supreme Court as defender of the constitution. This is because the judiciary always presupposes the existence of norms, which implies a state of normalcy. In short, Schmitt condemns the idea of a supreme court as the highest constitutional authority, in part, because of his insistence that legitimacy should *not* be treated merely as a type of higher legality. On this specific point, see *supra*: Schmitt 'The Legal World Revolution', 73-91.

¹⁰⁵¹ See *supra*: Bockenforde 'A key to Understanding Carl Schmitt's Constitutional Theory', 45-46: 'For Schmitt, a court operating in accordance with the standards of ordinary jurisdiction cannot serve as the guardian of the constitution. Why not? Again, Concept of the Political gives a hint. A court, as developed in the history of European constitutionalism is – in its tasks, function and the self-understanding of its actors - detached from the gravitational field of politics. It works only on request (no judge without plaintiff); it is bound by claims brought forward; and it operates in obedience to norms which are not to be created by the judge but are, as a rule, given in legally defined statutes. The court has to apply law without being required or permitted to pursue more general political goals or purposes. The guardian of the constitution, by contrast must act as a political organ. Given that the constitution shapes the legal form of the political unity, the guardian of the constitution is at the same time the guardian of the political unity itself. This derives also from Schmitt's understanding of the relationship between state and constitution'.

The golden thread made perfect

Consummation of his golden thread - unadulterated executive discretion - Schmitt achieves through artful analysis and deployment of Article 48. Capable of launching an expeditious response to the state of emergency, no less than that of normalcy, presidential authority becomes, for the 1933 Schmitt, not only incremental but ultimately all-encompassing:

- (i) Routine compliance with constitutional provisions. Typically relevant within a condition of political and social stability, this includes promulgation of laws within one month of enactment by the Reichstag;¹⁰⁵² or convening a referendum, within a like period, to concur or disagree with laws of the Reichstag should the president so determine.¹⁰⁵³ The constitutional role of the president even extends to a dissolution of the Reichstag '*as a necessary and normal means of achieving balance and of bringing about a democratic appeal to the people*';¹⁰⁵⁴ this, according to Schmitt, in exercise of a vital '*counterpoise between the legislative and executive branches*'.¹⁰⁵⁵ Pivotal here is the opportunity this affords the president to '*direct an appeal to the people and to produce a direct communication with the enfranchised state against the Parliament*'.¹⁰⁵⁶ Ideally aligned with the Reich Council, '*the dualism of the executive is eliminated and a strong government stands opposite the Reichstag*'.¹⁰⁵⁷
- (ii) In the face of imperilment to the integrity of the state, a constitutionally-ordained suspension of those seven provisions specifically enumerated within Article 48. This is precisely what occurred by presidential decree on 28th February 1933, just one day following the arson attack on the *Reichstag* that sealed the fate of the Weimar Republic.¹⁰⁵⁸

¹⁰⁵² Article 70.

¹⁰⁵³ Article 73.

¹⁰⁵⁴ Article 25.

¹⁰⁵⁵ *Supra: Schmitt Constitutional Theory*, 316.

¹⁰⁵⁶ *Ibid.*

¹⁰⁵⁷ *Ibid:* 370; see Article 74 which enables the Reich Council to object to laws passed by the Reichstag. If no agreement can be reached between Parliament and Government, the President may, within 3 months, order a referendum in the absence of which no law is deemed to have been passed. If the Reichstag has passed its law by a 2/3 majority in spite of objection by the Reich Council, the President must proclaim it as law within 3 months or order a referendum.

¹⁰⁵⁸ '*Decree of the President of the Reich for the Protection of the People and the State*' Reichsgesetzblatt I No.17, 1933, 83.

- (iii) Deployment of Article 48 discretion to disregard constitutional provisions in whole, or in part, whenever the president deems this synonymous with the people's will and, in circumstances where the textual constitution provides insufficient guarantees; that is, to perpetuate the subsisting legal order or to acknowledge that a full scale act of sovereignty is mandated. Contingent upon the location and preservation of the unwritten *positive* constitution, the president must decide whether this involves temporary disregard of legal norms or their permanent abrogation. Paramount above all is abnegation of any mode of constitutional interpretation that seeks to render inviolable particular provisions within the text but pays scant regard to the protection of the constitution in the positive and substantive sense.¹⁰⁵⁹ For this would pervert the purpose of Article 48 to the very antithesis of the role for which it was ordained, that is, the preservation of what Schmitt perceives as '*the return of state as substance in the form of an unbound executive*' able to act apart '*from the pernicious influence of interest groups in the legislative state.*'¹⁰⁶⁰ Nowhere, however, does Schmitt clarify precisely how the will of the people is to be gleaned or the means by which the unity of the people comes into being.¹⁰⁶¹
- (iv) Norm-establishment as the cornerstone of a new legal order, whenever this accords with the presumed will of the people

Evident, from (i) above, is that whilst a condition of normalcy subsists, Schmitt depicts the president as '*neutral, mediating, regulating and conserving.*'¹⁰⁶² To this extent, no ostensible discrepancy arises between the stances to which he and liberal-positivists respectively subscribe. Still capable of evoking disquiet, however, is Schmitt's perception of presidential authority as an instrument through which to circumscribe the legislative freedom of the *Reichstag*. It is this insistence on the supremacy of the executive wing of government over its parliamentary corollary that precludes any genuine congruence between the liberal constitutional state and Schmitt's implicit distortion of it. What of stage (ii)? Conceded by Schmitt is the vital resource Article 48 provides to the bourgeois *Rechtsstaat* in the throes of a state of emergency. Conformity

¹⁰⁵⁹ See *supra*: Schmitt *Constitutional Theory*, 157.

¹⁰⁶⁰ *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 115.

¹⁰⁶¹ This was to provide ammunition for liberal critics of Schmitt, none more vociferously than Hans Kelsen.

¹⁰⁶² *Supra*: Schmitt *Der Hüter der Verfassung*, 7-9.

even to the most stringently legal-positivist construal of the constitution enables the president to harness such augmented authority that Article 48 prescribes. With this, Schmitt does not take issue provided that it guarantees the survival of the legal order he envisages. What does impel him to diverge from a positivistic analysis is the delimitation of presidential discretion this necessarily connotes. Suspension of the seven constitutional provisions enumerated in Article 48 ought to represent a minimal level of permissible intervention; not to forestall full-scale discretionary intercession by the president. It is at stages (iii) and (iv) that this polarisation between a decisionist and legal positivist construal of the constitution starkly emerges. When the exception obtrudes and threatens to overwhelm the norm, Schmitt endows the now transcendent president with the stature to wield seemingly limitless authority; to formulate and implement decisions in sublime harmony with the postulated will of the people. If it is this quasi-theistic intervention that encapsulates a decisionist conceptualisation of presidential authority and its ambit, what is the correlative position Schmitt asserts that liberalism reserves for the president?

The links within the iron thread interlocked

First, the *hypocrisy* of a liberal constitutional mode of thought - in Schmitt's view always latent within it - is evident here. Reminiscent of the ever-present illusoriness of liberal ideology, the notion of genuine neutrality that the president putatively personifies is simply unattainable. Vaunted as *neutral* by advocates of liberalism, the president is unable to cling indefinitely to this status within the bourgeois *Rechtsstaat*. Detachment from the competing demands of a heterogeneous collection of disparate groups is not feasible. An unbridgeable chasm will invariably develop between the neutral function that liberals purport their president to exercise and their concrete exploitation of the presidential office. Not only do they diminish the neutrality they assert but also insidiously negate the potential supra-normativity of the president by engulfing the office-holder within a morass of factionalised party politics:

'...this role for Schmitt is just ersatz neutrality that conceals the power play of interest groups. It is either the neutrality of the honest broker who attempts to find a consensus between antagonistic parties or of the arbitrator who decides when no consensus seems necessary and hence has the authority to decide in virtue of an alleged subjectivity.... His argument seemed to be that there is a logical progression from honest broker to an arbitrator who is going to throw his weight in with one or other interest group, to the situation where the state is a mere plaything of one particular interest group. As such it must, for Schmitt, stand in antithesis to his own conception of the President.'¹⁰⁶³

Next, the same positive law of the constitution - which liberals reduce to sterile formalism by their resort to legal interpretation without sufficient cognisance of prevailing societal or political influences - confines the remit of presidential authority to (i) and (ii) above. This, Schmitt concludes, is inadequately flexible or far-reaching to protect his construct of a viable legal order. Since no constitutional text contains all fundamental norms and every constitution also contains precepts that cannot count as fundamental, a formal concept of the constitution that treats the constitution as the totality of the provisions comprised within it is fatally flawed.¹⁰⁶⁴ What alone possesses the impetus to safeguard a regime is the successful quest for and subsequent allegiance to a positive constitution – posited as wholly synonymous with the will of the people - that hovers above the constitutional text; the abnegation of formal legality in favour of

¹⁰⁶³ *Supra*: Dyzenhaus *Legality and Legitimacy*, 77.

¹⁰⁶⁴ See *supra*: Heller 'The Essence and Structure of the State', 265.

the vibrancy of super or, more precisely, ultra-legality. It is only the latter that has a reasonable prospect of securing the ongoing legitimacy of the constitutional order:¹⁰⁶⁵

‘For Schmitt, super-legality (borrowed from Hauriou) stood above constitutional laws and protected the concrete political order. This term referred to the legitimacy of the constitutional order, not just to a higher form of legality to be ensured by a constitutional court.’¹⁰⁶⁶

Insistence on a formalistic reading of the constitution inhibits the scope of presidential discretion to an extent incompatible with the demands of the concrete reality. Even to the extent that a liberal-positivist construal does permit the president to act, this function the constitution then proceeds to fetter.¹⁰⁶⁷ Because ‘*normativism prevents liberals from understanding the origins and dynamics of their own constitutional system*’,¹⁰⁶⁸ those who cohere with *Rechtssaft* principles have no compunction in delimiting the scope of presidential discretion or facilitating the ouster of any incumbent adjudged to have exceeded the stringent parameters of Article 48. Pre-emptive constitutional checks and balances upon the respective authority of the Reichstag, Reich Council and most portentously, the President, enshrined within a complex array of interconnected provisions, overly-circumscribe the latitude of each. This, Schmitt, finds remarkable in its naivety. For is not the formalistic legalism of a regime coincidental with its escalating inability to cope with the demands of the concrete reality? And does not the subjugation of power to legal norms inevitably blur the effectiveness of political leadership, as manifest in the vacillations of President Hindenberg in his interaction with successive chancellors, von Papen and Schleicher, during the death throes of the Republic?¹⁰⁶⁹ Just when the president needs to ‘*rule with an iron hand*’¹⁰⁷⁰ the

¹⁰⁶⁵ On this point, see *supra*: Heller, ‘The Essence and Structure of the State’, 265.

¹⁰⁶⁶ *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 65; in his appropriation from Hauriou of the term ‘super-legality’ Schmitt applied it, by 1932, as did Hauriou, in rejecting any institutionalised form of super-legality (arising from a specious strengthening of the validity of certain norms within the constitution) and, in particular, the control of the constitutionality of laws by a supreme court. What Schmitt meant by ‘super-legality’ was synonymous with his concept of legitimacy - the preservation of the over-arching ‘moral, ideological and philosophical image of a political system’. On this point, see *supra*: Schmitt ‘The Legal World Revolution’, 73-91, 74.

¹⁰⁶⁷ Examples include Articles 59 and 43, which respectively enable the impeachment of the president at the behest of the Reichstag and his premature removal from office at its instigation, with subsequent plebiscitary ratification.

¹⁰⁶⁸ *Supra*: Scheuerman *The End of Law*, 69

¹⁰⁶⁹ See *supra*: Schwab *The Challenge of the Exception*, 115; during this period, Hindenberg was seeking to deflect Hitler’s bid to be appointed to the chancellorship.

¹⁰⁷⁰ *Ibid*: 96.

normativism of a liberal mode of thought intercedes and nullifies the vast potentiality that a supra-normative solution would have implicitly authorised.¹⁰⁷¹

¹⁰⁷¹ See *supra*: Gottfried Carl Schmitt *Politics and Theory*, 59: ‘George Schwab has pointed out that had Schmitt’s pleas for presidential government been followed, Hitler would have been kept from power. It was Hindenberg’s anxiety about running the German state according to a strict interpretation of Article 48 that led him to appoint Hitler as Chancellor on 30th January 1933. Anxious about the extended use of presidential decrees, Hindenberg turned to Hitler because of his broad party basis’.

The iron thread fully forged

Contextualised within the vicissitudes of 1930s Germany, this vilification of the normative constraints that legal positivists seek to impose on presidential authority represents, in microcosm, Schmitt's wider invective against the perceived frailties of liberalism. Dazzlingly provocative is the *denouement* of his critique: its synthesis co-extensive with the lifespan of the Republic and its culmination contemporaneous with the demise of the Weimar dream. Founded upon an embryonic insight that '*great Catholic thinkers deem liberalism a more malevolent enemy than avowed secular atheism*',¹⁰⁷² '*Schmitt's Weimar books are rightly viewed as some of the most stunning critiques of liberalism and positivism ever penned*'.¹⁰⁷³ Is not the eve of the Republic's permanent subversion and with it, the consummation of the iron thread infusing his Weimar work, therefore, the moment to briefly recapitulate the previously-considered key elements of his anti-liberal polemic? All, for Schmitt, augment the iron thread that, with breath taking intricacy and dexterity, he has so meticulously woven during the Weimar years. In contrast, their target liberalism, in its various manifestations, contrives to controvert the golden thread within his skein.

Not only flawed but flagrantly fickle, liberalism, for Schmitt, embraces two dichotomous and equally untenable perspectives with the attendant contradictions these connote:

- (i) Positivistic value neutrality (in betrayal of what Schmitt deems the Hobbesian *decisionistic* foundation of legal positivism)

Liberalism:

- Fails juridically to recognise, far less cope with the exception
- Sublimates sovereign authority and charismatic leadership by subsuming them within the legal order
- Removes the capacity of the state to inspire or galvanise the people in the face of external or internal enemies
- Suppresses enmity, negates the political and paralyses the state in the face of its enemies, both within and outwith its boundaries

¹⁰⁷² *Supra*: Schmitt *Roman Catholicism and Political Form*, 38.

¹⁰⁷³ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology* (Cambridge: Cambridge University Press, 1997), 3.

- Repudiates the sovereign decision and the concept of the extra-legal realm of sovereign power as the founding moment of the state
- Relies on *veritas* not *auctoritas*; *ratio* not *voluntas*
- Claims unrealistically to eradicate the exercise of discretion in the interpretation and application of legal norms
- Is overly discursive and indecisive
- Privileges the doctrine of separation of powers
- Purports to strictly demarcate the making of law from its application
- Misconceives the nature of dictatorship
- Appropriates democratic categories in purported antithesis to dictatorship
- Rejects the significance of the concrete reality and the vibrancy of facticity
- Erroneously brackets out moral and societal influences
- Elevates law over politics¹⁰⁷⁴
- Promotes the rule of law over the rule of men and compounds this by attribution of legitimacy to the former rather than the latter
- Permits law to dominate political nature just as technology dominates material nature
- Embraces the concept of a *clockmaker* sovereign and a *night watchman* state with the attendant elimination of the interventionist sovereign
- Fosters heterogeneity, social pluralism and notions of formal equality before the law
- Forfeits the essential qualities of substantive equality and homogeneity of the people
- Inhibits coalescence of the people's will and its subsequent expression
- Facilitates spurious representation through secret ballot rather than by public acclamation
- Insists on a specious concept of legality reliant upon procedure, form and functionality rather than substance and content
- Believes that pre-ordained norms, supposedly valid in all situations, can encapsulate the entirety of law
- Rests on self-validity of the norm - as if norms are capable of propagating themselves
- Asserts the purported objectivity of the law by recourse to the impersonal, pre-established, publicly promulgated norm
- Rejects situational, *ad hoc* or targeted executive measures in favour of the generality of the statutory norm¹⁰⁷⁵
- Allows an interpenetration of society and state that leads to politicisation of society and societalisation of the state
- Reduces the state to one institution amongst many, all capable of competing for the allegiance of the populace

¹⁰⁷⁴ See *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 65: 'To an increasing extent, the state was perceived as a mechanism and a machine. Because the state of the absolute prince was bound by virtue of law and transformed from a power and police state into a constitutional state (*Rechtsstaat*) law too changed and became a technical instrument to tame the Leviathan'.

¹⁰⁷⁵ *Ibid*: 65, 'General legislation is the main feature of this development [the transition into a constitutional state] and the state itself changes into a positive system of legality. The *legislator humanus* becomes a *machine legislatoria*'.

- Depends on circularity of reasoning by demanding subjugation of the legislature to the selfsame law it creates (whereas Schmitt asserts that his theoretical position is not beset by the same problem): *'the positivist is not autonomous and therefore not an eternal type of juristic thinker. He subjects himself decisionistically to the decision of whichever current legislator possesses state power because only this legislator has actual power to bring about the decision's realisation. At the same time, the positivist demands in addition a firm and inviolable value as norm ie the state legislator himself must also be subject to the very same statute and its interpretation that had been created by him'* ¹⁰⁷⁶
 - Seeks to alienate irrationalism in all its manifestations
 - Purports to tame and regulate non-rational sources of political power
- (ii) The inconsistency Schmitt detects within (i) above
- Claims to subscribe to an unwaveringly value neutral stance but arbitrarily promotes its own values and pseudo-ethical perspectives in outright contravention of it
 - Violates this pledge of value neutrality still further in its recognition and promotion of a catalogue of inalienable individual rights (as at (iii) below), that both precede and transcend the legal constitution,
 - Advocates its unique brand of constitutional government and parliamentarism and, in particular, the supremacy of the Rule of Law
 - Dogmatically asserts the truth of substantive positions and procedures that further no interests save its own, even where this undermines the freedom of expression which liberals profess to hold dear ¹⁰⁷⁷
- (iii) Quasi-natural law perspectives

Liberalism:

- Recognises the natural right to freedom of state citizenry and the assertion of pre-political rights against the state ¹⁰⁷⁸
- Sporadically acknowledges a natural law limitation on the exercise of state power
- Implements and upholds a system of checks and balances on constitutional autonomy
- Places certain rights and liberties beyond democratic reform, thereby stifling the will of the people. In contrast, a democratic state uncorrupted by liberalism, recognises the people's will - both unquenchable and unimpeachable - as the sole absolute value
- Creates an individualistic rather than communitarian collectivist regime
- Temporarily suspends the 'right of resistance' as long as the state respects the 'law' and makes the duty to obey contingent on the willingness of the state to protect the individual citizen within its aegis

¹⁰⁷⁶ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 66; also *ibid*: 39-40.

¹⁰⁷⁷ For example, liberals oppose regimes as diverse as anarchist, theocratic, feudal, socialist and communist.

¹⁰⁷⁸ See *supra*: Schmitt *The Concept of the Political*, 70: 'For the purpose of protecting individual freedom and private property, liberalism provides a series of methods for hindering and controlling the state's and government's power'.

- Fallaciously fails to demand from each citizen the ultimate sacrifice of life
- Adopts an artificially beneficent rather than pessimistic view of the anthropological nature of humankind

(iv) The inconsistency Schmitt discerns within (iii) above

- Champions its own values but inexplicably lays them prey to subversion through advocacy of a purported natural freedom that empowers those it endows with the licence to destroy those selfsame rights it purportedly holds immutable
- Seeks to wage ideological conflict against every mode of governance or system antagonistic to that it seeks to promulgate but refuses to muster the weaponry with which to defend its own survival. By making *'the state a compromise and its institutions a ventilating system'*,¹⁰⁷⁹ this reduces the most potent foe to a mere debating adversary with whom existential issues can supposedly be resolved through the medium of rational discussion and peaceful consensus.

These deficits engender a regime, beset with immanent contradiction (as at (ii) and (iv) above). Presaging what becomes manifest at Nuremberg liberalism, for Schmitt, oscillates between the poles of substance and substance-less neutrality, reflected by vacillation between accounts which seek to import a normative substance into the law and legal-positivist perceptions of law.¹⁰⁸⁰ Introduced respectively at (iii) and (i) above, the first Schmitt chooses primarily to direct against liberals' incursion into the arena of international relations and the law governing the activities of nation states. Appropriation of universalistic concepts, such as *humanity* and the *conscience of mankind* is cynically disingenuous camouflaging as it does, for Schmitt, the immanent inconsistency, hypocrisies and dogmatism of liberalism. Whatever liberals may assert to the contrary, all they do, in Schmitt's view, is subscribe to an ideology where *'law is not inherently legitimate; legitimate law is that which possesses the right moral content [whilst] the standards of rightness are the standards set by the liberals themselves'*.¹⁰⁸¹ What galvanises liberals in the international sphere is not only promulgation but proselytisation of an ideology, unique to itself. Justification reminiscent of this natural

¹⁰⁷⁹ *Supra*: Schmitt *The Concept of the Political*, 70.

¹⁰⁸⁰ See *supra*: Dyzenhaus *Legality and Legitimacy*, 70; also *supra*: Salter 'Neo - Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's Critical Theory of Law', 161-194: 'Schmitt highlights the value-neutrality of liberalism (positivism) at one end of the pole and its advocacy of supposedly universal values of natural law at the other (a series of pre-political rights)... Within legal theory, liberalism creates an oscillation between a natural law commitment to supposedly "higher justice of higher rights and human rights" and a diametrically opposite stance of Kelsen's positivism which renounces any connection between law and moral standards of justice'; also *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 235: [In Schmitt's view] 'liberalism either asserted itself against any political challenge by claiming its metaphysical truth and by positing its views as absolute thus abandoning its promise of neutrality or else seemed helpless against its opponents'.

¹⁰⁸¹ *Ibid*: Dyzenhaus, 10.

law type ideology and pragmatically incorporated into the liberal litany was to later infuse the Nuremberg proceedings.¹⁰⁸² Self-serving in the extreme, liberalism emerges, for Schmitt, as the very antithesis of neutrality.¹⁰⁸³

At the other extreme is what Schmitt considers the Kelsenian inspired, suicidal value-neutrality of liberalism. Dethronement of a personalised sovereign; the consequential eradication of responsive subjectivity in the decision-making process and, in place of both, a misguided obsession with the formalistic sovereignty and objectivity of law and legal norms encourages:

‘a normativistic way of thinking [which] is capable of grasping the desertion of a deserter or the disloyalty of a traitor only as a matter of fact presupposition of a pronounced punishment by the State. It cannot understand in terms of the essential wrong and specific crime of violating an oath and treachery.’¹⁰⁸⁴

Lacking the capacity to differentiate between substantive values or standards, the functionalistic and formalistic legislative liberal state engenders a concept of legality that is substantively non-committal and dismissive of all that is objectively just.¹⁰⁸⁵ Neutrality towards the distinction between justice and its unacceptable counterpart endangers the authenticity and indeed the very existence of the state.¹⁰⁸⁶ Injustice is ‘*eliminated from the world only through a formal sleight of hand, namely by no longer calling injustice injustice and a tyrant tyrant*’.¹⁰⁸⁷ This value neutrality, adherents of liberalism then both exacerbate and undermine by their misguided recognition of contra-state, pre-political individual rights with the system of party pluralism and the mechanically statistical voting apparatus it propagates.¹⁰⁸⁸ These contrive to stifle the will of the people and, ultimately, to precipitate the collapse of the state as ‘*the organisations of individual freedom are used like knives to cut up the leviathan and*

¹⁰⁸² See *supra*: Chapter 2 for a detailed account of the utilisation of natural law doctrinal themes within the Nuremberg proceedings.

¹⁰⁸³ Schmitt’s treatment of liberalism’s influence on the development of international law and in particular its impact upon the *ius publicum europaeum* is explored *infra*: Chapter 5.

¹⁰⁸⁴ *Supra*: Schmitt *On the Three Types of Juristic Thought*, 52.

¹⁰⁸⁵ *Supra*: Scheuerman *The End of Law*, 68: ‘Positivists who insist on treating every constitutional clause in a perfectly neutral manner obscure the absolutely pivotal significance of “the will”’.

¹⁰⁸⁶ *Ibid*: ‘Only says Schmitt if we acknowledge that a constitution gains validity on the basis of a coherent political decision by a particular will can we begin to conceive of it as a unified hierarchically ordered whole where some constitutional clauses are more important than others’.

¹⁰⁸⁷ *Supra*: Schmitt *Legality and Legitimacy*, 29.

¹⁰⁸⁸ *Ibid*: 27: here, Schmitt condemns the supposed legality of law without substance and content that is rooted in arithmetical understandings of the majority.

divide the flesh amongst themselves'.¹⁰⁸⁹ Gravely weakened from within, the state '*neutral to all religions and creeds*',¹⁰⁹⁰ becomes dangerously susceptible to '*enemy capture*'.¹⁰⁹¹ Incapable of drawing the crucial delineation between friend and enemy, it lacks the weaponry with which to safeguard its validity as a viable governmental form. It is this development that causes the ordinary will of the *demos* to founder on the rocks of the liberal constitutional state and disintegrate.

Embedded within liberalism it is value neutrality that is, in Schmitt's view, a fundamental flaw deserving of the utmost contempt. But does not his thoroughgoing deprecation of liberal ambivalence pose *him* some awkward theoretical questions? For if the key to a proper understanding of value neutrality is its inability to distinguish between what is and is not deleterious to the legal order - '*between God and Satan*'¹⁰⁹² - what of the ironic but inescapable convergence between it and the amorality entrenched within Schmitt's own decisionist theory? And however self-contradictory he deems liberalism to be, is this not ironically mirrored in the position he seeks to advance? Quintessential to liberalism is its misguided objectivity even in the face of those who would threaten its very existence. But where liberals *depart* from the value-neutrality Schmitt purports to deplore – a divergence he should, if internally consistent, commend - he vilifies them for pedalling an ideology antithetical to all they ostensibly uphold. And if they proceed to champion values hitherto latent within their ethos – perspectives incidentally that Schmitt claims to abhor - he then perversely condemns them for their insipid lack of zeal in defending what they hypocritically profess to revere. What this produces is a liberal state deficient in the absence of values but no more perfect in their presence.

Equipped with this flawed, yet nonetheless devastating substantive and methodological critique, the moment is finally at hand for Schmitt to pounce on the perfect concrete showcase for his polemic against value neutrality: Article 76 of the Weimar Constitution. For no other provision more aptly epitomises all he despises within a

¹⁰⁸⁹ *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 74.

¹⁰⁹⁰ *Supra*: Dyzenhaus *Legality and Legitimacy*, 63.

¹⁰⁹¹ *Supra*: Dyzenhaus 'Now the Machine Runs itself', 1-19.

¹⁰⁹² *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 89.

typically tepid liberal-positivist response to potentially lethal threats posed to the subsisting legal order.

Exemplification of the iron thread: the principle of ‘equal chance’

Article 76

The Constitution may be amended by law. But acts of the Reichstag amending the Constitution can only take effect if two-thirds of the legal number of members are present and at least two-thirds of those present consent. Resolutions of the Reich Council also require a two-thirds majority of the votes taken, when an amendment to the Constitution is in question. If on a popular initiative an amendment to the Constitution is to be decided by referendum the consent of a majority of those qualified to vote is required.

If the Reichstag has passed an amendment to the Constitution in spite of an objection on the part of the Reich Council, the President may not proclaim such law, if within two weeks the Reich Council demands a referendum.

Close perusal of this clause and Schmitt’s analysis of the controversy surrounding its content and deployment present a fascinating conduit to the respective stances that he and the liberal *Rechtsstaat* adopt towards presidential authority. With each - Articles 76 and 48 - Schmitt decries the formalism demanded by a strictly positivistic interpretation and it is in his *Legality and Legitimacy* (1932) (*LL*)¹⁰⁹³ that the distrust of Article 76, first expressed in *Constitutional Theory* (1928) (*CT*),¹⁰⁹⁴ attains fruition.¹⁰⁹⁵ In these, Schmitt blends his contempt for the pluralistic invasion of the state and his prior adherence to substantive homogeneity with a blistering onslaught against the principle of *equal chance* consequential upon application of this provision. Though in *Reich v Prussia*, Schmitt had vilified the denial of equal chance by Prussia towards its opponents, the approach he adopts in *LL* is the diametric reverse.¹⁰⁹⁶

According to Schmitt, immanent to every constitution must reside a core of inviolability against those who would seek to undermine it by the introduction of a constitutional form antagonistic to the will of the people:¹⁰⁹⁷

¹⁰⁹³ *Supra*: Schmitt *Legality and Legitimacy*.

¹⁰⁹⁴ *Supra*: Schmitt *Constitutional Theory*.

¹⁰⁹⁵ Interestingly, in his 1958 Afterword to *Legality and Legitimacy*, *supra*: 90, Schmitt comments that the core thesis of *LL* was that ‘the legality of a party can only be denied when the authority to make amendments is limited’. This thesis he says was rejected and disqualified by leading treatises of constitutional law as political fantasy law.

¹⁰⁹⁶ On this point see *inter alia supra*: Seitzer *Introduction to Constitutional Theory*, 25.

¹⁰⁹⁷ Volker Neumann ‘Introduction to Carl Schmitt’ in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 280, 286: Neumann highlights the influence of Schmitt on the inclusion of Article 79(3), a protective ‘norm of inviolability’ within the new constitutional Basic Law, enacted in post-WWII Germany.

‘The fundamental political decisions of the constitution are a matter for the constitution – making power of the German people and are not part of the jurisdiction of the organs authorised to make constitutional changes and revisions. Such amendments bring about a change of constitution, not a constitutional revision.’¹⁰⁹⁸

In contravention of the above ideal, however, Article 76 enables amendments to the constitution to be made on the requisite statistical majority of the stipulated quorate forum of the Reichstag. Arithmetical criteria somehow attain constitution changing status.¹⁰⁹⁹ Whereas it is feasible for the plebiscite to express its will by simple majority, the higher percentile that Article 76 requires of the Reichstag denotes, for Schmitt, a significant lack of trust in the legislative branch of liberal governance.¹¹⁰⁰ The legislature can proceed to implement laws within Article 68 – and once having satisfied the higher majority that Article 76 prescribes – is then empowered to inaugurate an entirely new type of state: the wholesale displacement of the liberal *Rechtsstaat* in favour of monarchy or communism or even, perhaps, a fascist dictatorship!¹¹⁰¹

This, for Schmitt, illustrates the flaws inherent in any system that *permits* a larger than usual majority vote of delegates within the legislature to effect potentially cataclysmic constitutional alterations – changes that may utterly destroy the constitution.¹¹⁰² If this were not enough, Article 76 also enables two-thirds of the legislature to enact laws *prohibiting* further constitutional amendments without the sanction of such arithmetical majority as it shall periodically decree, even to the extent of precluding constitutional revision entirely. This signifies the dual peril lurking within Article 76: not only does it facilitate amendments that herald constitutional annihilation¹¹⁰³ but compounds this by

¹⁰⁹⁸ *Supra*: Schmitt *Constitutional Theory*, 152

¹⁰⁹⁹ See *supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 30: What Schmitt called the absolute constitution could not simply be changed by constituted powers. Thus, the essential parts of the WC were not capable of change under Article 76.

¹¹⁰⁰ See *supra*: Schmitt *Legality and Legitimacy*, 44; *ibid*: 64: ‘One must ask why the consent of a 2/3 majority is required for a constitutional amendment in parliament while a simple majority is needed for a referendum through an initiative for the same purpose. This is a remarkable no confidence declaration against the parliamentary legislative state’.

¹¹⁰¹ *Supra*: Schmitt *Constitutional Theory*, 151: ‘A constitution resting on the constitution-making power of the people cannot be transformed into a constitution of the monarchical principle by way of a constitutional “amendment” or “revision”. That would not be constitutional change: it would be constitutional annihilation’.

¹¹⁰² *Ibid*: 150: ‘It is not possible to use the qualified majority procedure of Article 76 to change Article 76 such that constitutional amendments are undertaken through simple majority decisions of the Reichstag’; also *ibid*: 153: ‘the authority to alter and extend the constitution cannot be boundless and has not been conferred in order to eliminate the constitution itself’.

¹¹⁰³ See *supra*: Seitzer *Introduction to Constitutional Theory*, 446, n. 46: Seitzer points out here that not only legislative but also presidential power could be enhanced on a vote of a 2/3 majority of the Reichstag. This would enable a law to be enacted granting the president, for example, a right to issue

precluding alterations to the constitution, even where indispensable for the preservation of the legal order.¹¹⁰⁴ Hamstrung on both counts, the existing regime commits suicide:

‘To Schmitt, the establishment of a constitution is a process revealing meta-legal dimensions of a legal order. To Schmitt, these meta-legal dimensions become relevant in determining what in a constitution cannot be changed, even by legally specified channels, without undermining its coherence. If there is no limit to what the legal power within the constitution can change, it follows that every provision of the constitution could be altered by the very procedure it specifies. This would then not be the same constitution unless a constitution is nothing but the provision which specifies how the laws can be changed in any way a qualified majority of the legislature wishes...Legal positivism he argued provides no answer to one of the fundamental questions of constitutional jurisprudence – how open can a constitution be to legal alteration given that this legal power is authorised by the constitution itself.’¹¹⁰⁵

Inherent, therefore, within Article 76 is the equal chance it affords to ‘*anyone to amend the constitution, even those who wished to abolish it and replace it with a version of their own which would be tantamount to constitutional or system suicide*’.¹¹⁰⁶ This is catastrophic, highlighting as it does the self-subverting vulnerability of liberal constitutional governance. Vital instead is recognition of ‘*the substantive characteristics and capacities of the German people as opposed to the retention and extension of functionalist value neutrality with the fiction of the equal chance for all contents, goals and drives*’.¹¹⁰⁷ What Schmitt abhors is the facility to effect not only procedural or innocuous substantive changes to the constitutional text but what he describes as ‘*apocryphal acts of sovereignty*’.¹¹⁰⁸ Whilst the one evokes little concern, the other contains the toxic seeds of its own downfall.¹¹⁰⁹ Imperative here is that no

decrees with the force of law which could then deviate from express constitutional provisions. Presumably, this would have been a deployment of Article 76 with which Schmitt would not have readily taken issue, mindful of his belief that the President would preserve the ‘positive constitution’.

¹¹⁰⁴ See *supra*: Schmitt *Legality and Legitimacy*, 53: Schmitt expresses concern that a 2/3 majority amending the constitution could use the moment of its majority to decide with constitutional force that certain interests and persons are in the future protected against 100% of all voters and that specific norms are not subject to change through any type of majority or even unanimity. They are for ever placed beyond the possibility of legal revision; also *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 96: ‘While Schmitt was opposed to a completely relativist concept of the constitution in which qualified legislative majorities would change everything, Schmitt was also opposed to those who claimed that a constitution could not be replaced except by its own legal channels. In his opinion, this was precisely how a constitution could not change’.

¹¹⁰⁵ *Ibid*: Balakrishnan, 82.

¹¹⁰⁶ *Supra*: Schmitt *Legality and Legitimacy*, 143, n. 48.

¹¹⁰⁷ *Ibid*: 93.

¹¹⁰⁸ See *supra*: Schmitt *Constitutional Theory*, 155 where Schmitt stresses that it is necessary to remain conscious of the distinction between constitution amending statutes and pure acts of sovereignty.

¹¹⁰⁹ See *supra*: Schmitt *Legality and Legitimacy*, 58: ‘the remarkable result occurs that the fundamental principles of general freedom and property pertaining to the *Rechtsstaat* have only the 51% lower legality whereas the rights of religious societies and religious officials (even the right of unions) have the higher 67% legality’. Thus, the very inclusion of Article 76 within the constitution antagonises Schmitt in that,

constitutional text must embody the instrument of its own destruction.¹¹¹⁰ Otherwise, by a fatal decision to ‘*give warring factions, intellectual circles and political programmes the illusion of gaining satisfaction legally*’, ‘*it will necessarily fail at the decisive moment when the constitution must prove itself*.’¹¹¹¹ No constitution, worthy of this designation, should provide a legal method for the elimination of its own legality, far less the legitimate means to the destruction of its legitimacy:¹¹¹²

‘A constitution that chooses to give warring factions, intellectual circles and political programmes the illusion of gaining satisfaction legally, of achieving their party goals and eliminating their enemies by legal means, such a constitution is no longer even possible today as a dilatory formal compromise and as a practical matter it would end up destroying its own legitimacy and legality.’¹¹¹³

The principle of equal chance, implicit within Article 76, is in Schmitt’s view an unavoidable and regrettable consequence of a loss of homogeneity and the party pluralism it engenders; a regime that welcomes all-comers and is characterised by its inability to distinguish between those amenable to its preservation and others injurious to its continued existence. One in which ‘*any goal, however revolutionary or reactionary, disruptive, hostile to the state or Germany, or even godless is permitted and may not be robbed of the chance to be obtained via legal means*’.¹¹¹⁴ Marred by relativism, even nihilism, liberalism can lay claim to no principle or ideology likely to protect it against subversion.¹¹¹⁵ From this insipid agnosticism, the insoluble deficits

for example, it places religious associations and civil servants within the special protection of the constitution, since laws which affect them cannot be altered without a 2/3 majority. Schmitt sees no authentic reason for this and takes it as evidence that liberalism has no firm epicentre. It allows itself to be weakened by a spurious adherence to the preservation of certain interest groups whilst remaining adamantly neutral to its own existence. What liberalism fails to realise is that if it does not adequately protect itself, it can hardly safeguard the interests of anyone else.

¹¹¹⁰ See *supra*: Schmitt *Constitutional Theory*, 146: ‘Like every constitutional authority, the authority to amend or reverse constitutional laws is a statutorily regulated competence. It is in principle bounded. It cannot transcend the framework of constitutional regulation upon which it depends’; also *ibid*, 73: ‘The substantive meaning of the constitution has completely receded because the constitution was rendered relative by its transformation into constitutional law and by the formalisation of constitutional law’.

¹¹¹¹ *Supra*: Schmitt *Legality and Legitimacy*, 93.

¹¹¹² *Ibid*: 58; also *supra*: Schmitt, ‘The Legal World Revolution’, 73-91.

¹¹¹³ *Ibid*: Schmitt *Legality and Legitimacy*, 93.

¹¹¹⁴ *Ibid*: 48.

¹¹¹⁵ See *supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxviii: ‘Schmitt condemns legal processes that operate in an entirely value neutral way. Open legality invites the triumph of absolute illegality. This is the basis of Schmitt’s thesis of an inherent weakness in the rule of law’; also *ibid*: xxxi: ‘For Schmitt, the value-neutral functionalist and formal concept of law facilitates the legislative state’s self-adolescence. It provides no substantive ground by which to judge the intentions or aims of different political parties’; also *supra*: Scheuerman *End of Law*, 64 where Scheuerman posits that for Schmitt, Kelsen’s positivism culminates in a brand of nihilism unable to provide a proper defence of its own purportedly liberal aspirations; also *supra*: Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against*

that Schmitt discerns are twofold. No goal, however hostile to the state of Germany is unconstitutional nor, by extension, is it constitutional to curtail or constrain the opportunity of the equal chance to all-comers of whatever political persuasion.

Both these outcomes Schmitt considers inevitable by-products of an attenuation of homogeneity wherein ‘*an assumption of an indivisible commonality*’ no longer prevails.¹¹¹⁶ Because the democratic identity between governing and governed ceases due to the increasing empty and abstract functionalism of pure mathematical majority determination, ‘*there must be recognised the unconditional equal chance for all conceivable opinions, tendencies and movements to achieve a majority*’.¹¹¹⁷ At this crucial moment in the life of the state, the liberal *Rechtsstaat* is left with no alternative but to introduce the specious unconditional equal chance for all factions. But this is not all. For having admitted all-comers into the political process and afforded them the critical opportunity to seize the mantle of power, one further consequence ensues.¹¹¹⁸

Crucial here is what Schmitt defines the political premium of power; the supreme danger of implicitly allowing a party in possession of a merely transitory mandate to pass laws to change those selfsame legal norms through which it managed to attain power:¹¹¹⁹

Politics as Technology, 89: ‘If one cannot distinguish between God and Satan then what can be distinguished. Everything becomes the same; everything is neutralised’.

¹¹¹⁶ *Supra*: Schmitt *Legality and Legitimacy*, 28.

¹¹¹⁷ *Ibid.*

¹¹¹⁸ *Supra*: Schmitt ‘The Legal World Revolution’, 73, 83: Schmitt asserts that under the principle of equal chance, every right and left party can legalise its basic values: ‘It can create a political chance of compelling obedience to the state. That would constitute the most incalculable of all premiums of the legal holding of power. In the Weimar Constitution, it carefully sought not to completely close the door to legalised political power by scrupulously seeking to respect the principles of the liberal constitutional state. The door of legality was left open to the right as well as the left’.

¹¹¹⁹ See *supra*: Schmitt *Legality and Legitimacy*, 51: ‘According to Article 76, a two thirds majority sufficient for amending the constitution and present at the particular moment can pass substantive legal norms with the authority of constitutional law and through it, limit the area of authority of the ordinary legislature, that is, the simple majority. But by abandoning the principle of the simple majority and by requiring stronger majorities, the functional principle of the transitory is also simultaneously destroyed. The present two-thirds can create lasting effects and obligations beyond its momentary presence that are unreasonable and unjust under any conceivable perspective. In an undemocratic, even an antidemocratic way, a two-thirds majority can place limitations on the will of the people itself even when it no longer has control over a majority’; also *ibid.*: 49: ‘From the standpoint of value neutrality of the functional system of legality of the First Part of the Weimar Constitution, when the current majority party intends to declare the opposition party illegal as such, it can only do so by misusing its legal power’.

‘The majority is conferred with the legal possession of state means of power. It is no longer a party; it is the state itself. The mere possession of state power produces an additional political surplus apart from the power that is merely normative and legal.’¹¹²⁰

What emerges in every unavoidable critical moment – one that Schmitt claims the liberal constitutional state scarcely acknowledges as feasible – is the inevitable opposition between this premium on the legal possession of power and the principle of equal chance.¹¹²¹ Facilitated by the procedural-arithmetical mechanism Article 76 prescribes, the decision whether to preserve, impair or eradicate the established mode of governance rests entirely on the vagaries of the ruling party. Whatever decision it makes as to the illegality of domestic opponents is determinative of the rights it accords its competitors:

‘The majority would be permitted to use legal means to close the door to legality through which they have themselves entered and to treat partisan opponents like common criminals.’¹¹²²

For its own nefarious ends, the ruling party may convert transitory authority into power of a more permanent nature.¹¹²³ Unlike the President, with the discretion ‘*to ban political parties who would rise to power and seize the political premium of power*’,¹¹²⁴ the normativistically oriented but fatally flawed liberal-constitutional state, in its ‘*final relativistic form, arms its own enemies*’.¹¹²⁵ What emerges is that ‘*one can hold open an equal chance only for those whom one is certain would do the same. The use of such a principle would not only be suicide in practical terms but an offence against the principle itself*’.¹¹²⁶ Just as the pluralist liberal regime renders inevitable the principle of equal chance it espouses, it compounds this error by enabling those who would fatally undermine it to do precisely what it ought to forestall.¹¹²⁷ This, for Schmitt, is an unavoidable consequence of a diversity of factional interests, competing for supremacy

¹¹²⁰ *Supra*: Schmitt *Legality and Legitimacy*, 31.

¹¹²¹ *Ibid*: 33.

¹¹²² *Ibid*: 30.

¹¹²³ See Henry Grosshans ‘Review of *Political Romanticism*’ *TELOS* No. 72, (Summer 1987), 214-217: ‘In 1932, Schmitt argued that equal chance was inappropriate. Constitutional powers could and should not be used by those intent on destroying the constitution’; also *supra*: Hirst ‘Carl Schmitt’s Decisionism’, 15-27: Hirst explains here that Schmitt condemns the principle of equal chance and a state bound by law since the inevitable consequence is a weak state.

¹¹²⁴ *Supra*: Schmitt ‘The Age of Neutralisations and Depoliticisations’, 130.

¹¹²⁵ *Supra*: Scheuerman *The End of Law*, 64.

¹¹²⁶ *Supra*: Schmitt *Legality and Legitimacy*, 33.

¹¹²⁷ See *ibid*: 68.

within the state and regrettably *with* the state itself.¹¹²⁸ Harnessing legal-constitutional mechanisms in a scrupulously formalistic manner Schmitt observes, with some acerbity, is liable to produce an overthrow of the state order. Somewhat perversely, it is only through *non-compliance* with the procedural constraints of Article 76, specifically, by breach of the positive law of the constitution that coherence with the inviolable and quintessential spirit of the constitution is liable to occur:

‘Without a sense of contradiction, one can consider the dissolution of the Reichstag legal even though it is a coup d’etat and vice versa a parliamentary dissolution might substantially conform to the spirit of the constitution and yet not be legal.’¹¹²⁹

Ludicrous, to Schmitt, is liberalism’s embrace of its enemies in accordance with the legal rules of a formalistic game.¹¹³⁰ Causative of both a dissolution of the constitution into sterile rules and dilution of ethical principles into mere tenets of fair play, it is the liberal-positivist construal of Article 76 that is responsible for undermining the structural and substantive essence of the legal-constitutional order. What Schmitt appears to dread, above all, is the escalating tendency towards a pluralist disbanding of the unity of the political whole in favour of an agglomerate of changing agreement between heterogeneous groups,¹¹³¹ especially those who see ‘*themselves as an incarnation of universalist values*’.¹¹³² Less frequently in his invective against the value neutrality of the liberal constitutional state, does he appear to anticipate - or at least openly acknowledge any fear – that the likely beneficiary of the principle of equal chance and its subsequent universal denial to potential challengers will be the fascist despotism of National Socialism.¹¹³³

¹¹²⁸ See *supra*: Schwab *Foreword and Introduction to The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, xii: ‘Depoliticization of society was the key: the state must prohibit politically centrifugal forces from operating within its domain. In 1932, he advocated a ban on political parties that considered liberal democratic rules of the game as nothing more than tactical means of gaining power legally and once in power closing the same door to others’.

¹¹²⁹ *Supra*: Schmitt *Legality and Legitimacy*, 9; see also *supra*: Kaufman ‘On the Problem of the People’s Will’ in *Weimar A Jurisprudence of Crisis*, 197, 206: ‘It follows that the necessary point of departure for all constitutional theory is an insight into what the people’s spirit and the people’s will actually are. All questions of constitutional form recede before the significance of this reality’.

¹¹³⁰ For a discussion of this, see *supra*: Kennedy *Introduction to The Crisis of Parliamentary Democracy* by Carl Schmitt.

¹¹³¹ See *supra*: Schmitt ‘State Ethics and the Pluralist State’ in *Weimar A Jurisprudence of Crisis*, 300.

¹¹³² *Supra*: Holmes *The Anatomy of Antiliberalism*, 43.

¹¹³³ *Ibid*: ‘To Schmitt, the Nazis were not dangerous prior to the seizure of power. Schmitt did see them as immature, able to make Germany ungovernable but unable to govern themselves.’ Holmes conjectures, however, that the motivation for such comments was not hatred of the Nazis but fear that their lack of ability to rule effectively would be, for example, exploited by the Communists.

Consummation of the Weimar skein

As the lambent flame of the Weimar Republic is extinguished, the Schmittian skein is complete but at what cost? Through his anti-liberal polemic and his relentless, though ultimately inefficacious manipulation of presidential authority, is he seeking to save or destroy the republic?¹¹³⁴ Appropriating the mantle of abortive saviour of the constitution, Schmitt later bewails the futility of his efforts to surmount the legality and value-neutrality of the liberal constitutional state. What this entailed, he claims, was that *'the door remained open enough to facilitate the destruction of those compromises necessary to the structure of the constitution'*.¹¹³⁵ Lamenting that his juridical efforts *'to oust a rational interpretation of the provisions for revision of the Weimar Constitution failed, due to the partly sceptical, partly ironic approach of its other interpreter'*,¹¹³⁶ Schmitt does, however, leave one crucial question unanswered. For tantalisingly veiled beneath his powerful rhetoric remains the underlying rationale both for his assault on liberalism and his ostensible support for the survival of the Republic.

What is perhaps most plausible is that his critique never comprises a genuine attempt to enable or persuade liberalism to address its deficiencies and thereby survive in an ameliorated form.¹¹³⁷ Rather, by his exposé of the problems endemic within liberalism, many of which he clearly deems intractable, he conceives the only viable solution to lie in a radically distinct mode of governance - a concept of a legal order that conforms to his own ideal of authenticity.¹¹³⁸ That is, an authoritarian regime overseen by a dictator-like figure with the power to act in a normatively unconstrained fashion whenever required by the demands of the concrete reality; one characterised not by legality but by

¹¹³⁴ See *supra*: Mc.Cormick, *Introduction to Legality and Legitimacy*, xix; also *supra*: Strong *Foreword to The Concept of the Political*, xv: 'It is worth remembering that Schmitt was among those who sought to strengthen the Weimar regime by trying to persuade Hindenberg to invoke the temporary dictatorial powers of Article 48 to guard against extremes to the right and left; on a similar theme, see Paul Piccone and Gary Ulmen 'Uses and Abuses of Carl Schmitt' available online: <http://foster.20megsfree.com/443.htm> (accessed 4.10.2006).

¹¹³⁵ *Supra*: Schmitt 'The Legal World Revolution', 73, 83.

¹¹³⁶ *Ibid*: Schmitt was alluding here to Hitler's 'legal' rise to power, culminating in the Enabling Act 24.3.1933. Further details of Hitler's acquisition of 'the political premiums of the legal holding of power': *ibid.* 75 are contained *supra*: Chapter 2.

¹¹³⁷ See *supra*: Holmes *The Anatomy of Antiliberalism*, 43: 'Schmitt resisted attempts to amend the Weimar Constitution not out of respect for the Weimar Constitution but because of his fear of what would emerge from the left were the Constitution overthrown.' Holmes surmises that Schmitt feared the possibility of a communist coup or foreign domination.

¹¹³⁸ See *supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 151: 'the same characteristics of liberalism which makes it ignore the perils of the exception also makes it susceptible to alternatives like the one put forward by Schmitt'.

a uniquely formulated brand of legitimacy. Whether Schmitt intended this to encompass unqualified alignment with the yet-to-be experienced depravities of National Socialism was to cloud his reputation for the remainder of his life, as it continues to taint his legacy beyond the grave.

As for Schmitt's critique of liberalism, its kernel lies in what he perceives to be the positivist displacement of the question: 'who decides'? Who determines how open a constitution can be to legal alteration when the authority to amend the constitution reposes within the constitution itself?¹¹³⁹ By enshrinement of specific provisions within the Weimar Constitution, its drafters presumably intended to accord them the *gravitas* commensurate with their location and status. If then the same constitution permits an arithmetical majority of the legislature to effect amendment to the provisions within it, what degree of residual legitimacy remains should the organs of government choose to eradicate any or all of them. Equally applicable to the Article 116 embargo on retrospective punishment as to other provisions enjoying special constitutional protection, legality would still inure to the positive law segments that remain but what of legitimacy? Is a regime that permits removal of those pivotal elements that arguably encapsulate its essence - a veto on the deployment of *ex post facto* criminal sanctions; indispensability of the generality of the statutory norm with the concomitant repudiation of the situation-specific, non-publicly promulgated norm; recognition of individual rights against the state; insistence on separation of powers; an independent judiciary - worthy of the continuing designation: *liberal Rechtsstaat*? Would liberals insist that a system of governance lacking one or more of these facets is the same regime to which they originally subscribed? Would they be able to justify an ongoing claim to legitimacy? If not, how is the apparent deficit between formal legality and legitimacy, identified by Schmitt, to be addressed? Is legal positivism competent to deal with the challenges this poses? How is a legal order to protect itself when that selfsame legal order consigns every significant issue to value-neutral normative resolution even in the face of an existential threat to its continuation?

If it is implicit within any viable constitution that nothing injurious to its survival is permissible, does not Schmitt's critique of positivism unmask the inadequacy of a

¹¹³⁹ *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 94.

strictly positivist approach to constitutional amendment and, in a wider sense, to the alleged formalism of legal positivism? Whatever dangers lurk within his theoretical emasculation of liberalism is it not, therefore, true that Schmitt ‘*flags up real concerns about positivist conceptions of constitutional interpretation and amendment*’,¹¹⁴⁰ that advocates of the liberal tradition would be foolhardy to disdain?¹¹⁴¹ Whether Schmitt is able to proffer solutions to these quandaries of a more determinate or palatable nature than those of which the liberal-positivist tradition appears capable is yet to be considered.¹¹⁴² Does a legal order primarily predicated on deformed law-making and application ultimately possess any intrinsic superiority over a system founded on what Schmitt deems an overly rigid and arid formalism? Was the collapse of the Weimar Republic, with the attendant rise of fascism, attributable to the inherent susceptibility of liberalism to hostile takeover or the systematic impetus of those like Schmitt who craved authoritarian governance?

‘Legality and Legitimacy is the historical document that bears witness to a dubious historical truth contrived in Germany by natural law jurists and brought to America by figures like Leo Strauss after WWII; that the greatest danger to stability in modern societies is popular government too easily enabled by legality and not say the subversion of legal democracy by conservative elites. The latter is closer to the truth of Weimar’s collapse, the narrative of natural law theorists and Leo Strauss notwithstanding. Schmitt was correct when he declared that truth would have its revenge. The content of that truth however was not necessarily the weaknesses of constitutional democracy but rather the proclivity of authoritarian elites to exploit those weaknesses in potentially devastating ways.’¹¹⁴³

Whatever the relative merits of a Schmittian/liberalistic approach, what is clear is that the Nazis – bolstered by a combination of blatant thuggery and cynical skullduggery – were able to avail themselves of the procedural mechanism Article 76 afforded. In this, at least, Schmitt’s warning was proved fatefully correct. Having grasped the political premium of power, the door was effectively slammed shut in the face of those who

¹¹⁴⁰ *Supra*: Scheuerman *The End of Law*, 73.

¹¹⁴¹ But see *supra*: Gottfried *Carl Schmitt Politics and Theory*, 104: ‘Liberal indifference to the persistence of human conflict and the liberal pre-occupation with mere legality in the face of a reckless demagogue’s taking political power played a role in undermining Weimar constitutionalism. Weimar parliamentarians were the victims of certain demonstrable liberal attitudes. An uneasiness with the concept of sovereignty and the unwillingness to concede extraordinary power to the state can be seen among classical liberals. But Schmitt’s examples of liberal hostility to the state have more limited applicability than he thought. On the basis of Weimar parliamentary thinking, he exaggerated particular features of liberal constitutionalism that were less destructive and less apparent outside of interwar Germany’.

¹¹⁴² See *infra*: Chapter 5.

¹¹⁴³ *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xlii.

would challenge their acquisition of dominance.¹¹⁴⁴ This, the Nazis achieved by enactment of the Enabling Act 1933, which displaced democratic institutions and introduced permanent constitutional changes, specifically the leadership principle as a governmental form.¹¹⁴⁵ Article 1 of the Act, with its fusion of executive and legislative functions within the Reich government, left no doubt that the doctrine of separation of powers - a seemingly indispensable bastion of liberalism - was abrogated. Though Schmitt had consistently warned that '*separation of powers and legal positivism defile the authority of the state through emphasis on uninterrupted processes, rather than what is substantively important about a regime*',¹¹⁴⁶ the threat to the Weimar Republic that Schmitt had so vividly presaged was realised to an extent that even he could scarcely have foreseen.

¹¹⁴⁴ *Supra*: Caldwell 'Legal Positivism and Weimar Democracy', 273-301: Caldwell highlights how postwar natural law jurists blamed the collapse of Weimar on the purported easy formalism and sheer value neutrality of legal positivism rather than the concrete strategies of conservative lawyers like Schmitt who were pursuing substantive legal agendas.

¹¹⁴⁵ From 538 representatives present in the *Reichstag*, 444 voted in favour of the Enabling Act, 24th March, 1933. The two-thirds majority prescribed by Article 76 was thus obtained, though the Nazis had made this outcome more likely by taking 50 Communist delegates into 'protective custody' following the arson attack on the *Reichstag* on 27 February 1933 and before the vote on the Enabling Act was held. Article 1 ordained that Reich laws could be passed not only by the procedure specified in the Constitution but also by the Reich government. Article 2 stated: 'The laws passed by the Reich government can deviate from the Reich Constitution insofar as they do not apply to the institutions of the *Reichstag* and *Reichsrat*. The rights of the president remain intact'; see generally *supra*: Schwab *The Challenge of the Exception*, 102-104; *supra*: Bendersky *Carl Schmitt Theorist for the Reich*, 196-198.

¹¹⁴⁶ *Supra*: Mc.Cormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 127.

The way forward

Outwardly unfazed by this turn of events, Schmitt's obsession with the maintenance of civil order, at the outset of the Nazi era, remained undiminished. As a deeply-entrenched conservative confronted with the perceived alternative: '*Hitler or chaos*'¹¹⁴⁷ it is, perhaps, no surprise that Schmitt opted to deploy his considerable intellectual talents in furnishing a pseudo-legalistic foundation¹¹⁴⁸ for arguably the most malign and unprincipled political system the world had ever hosted: National Socialism.¹¹⁴⁹ But by what methodology was this to be achieved? How would his Weimar dalliance with decisionism fare in light of the advent of a reign of terror, itself characterised by authoritarianism of the most flagrant variety? Would his polemic against legal positivism and all it entailed endure in the face of the National Socialist onslaught on the rule of law? Or was this the time to acknowledge that even the formalistic legality that Schmitt so patently deplored was preferable to the invidious alternative the Nazis pedalled: *ad hoc*, clandestine law making and its ruthlessly arbitrary execution.

Scant evidence, however, emerged from Schmitt's late-Weimar work to indicate the least recidivist inclination towards the Neo-Kantianism with which he had fleetingly toyed and then discarded in the pre-WWI period. Legal positivism with its accompanying '*Rechtsstaat ideal of a legislative state as a closed system of discretely formulated norms, administered by the separation between legislative and executive*' continued, for Schmitt, to be nothing more than '*a fiction*'.¹¹⁵⁰ Even if liberals were sincere in their professed allegiance to a regime with such paucity of intrinsic authenticity – a candour which Schmitt sporadically doubted, such was the level of hypocrisy he detected within their ideology – they were hopelessly misguided in their ostensible subscription to it. Propagating sham universality in the international arena where, in Schmitt's view, cosmopolitanism was neither sought nor desired, liberals

¹¹⁴⁷ *Supra*: Hirst 'Carl Schmitt's Decisionism', 15, 16.

¹¹⁴⁸ Arguably, Schmitt's focus upon the myth of the will of the people rendered his theories only too amenable to exploitation by the Nazis, given their obsession with racial identity: see *supra*: Caldwell 'Legal Positivism and Weimar Democracy', *The American Journal of Jurisprudence* Vol. 88, (1994), 273- 301: 'Far from excluding natural law from judicial practice, the Nazis developed a kind of secular, biological "natural law" of race and nation, which was able to take precedence over existing written law in concrete cases'.

¹¹⁴⁹ See N. O'Sullivan *Fascism* (London: Dent and Son, 1983), 153 where O'Sullivan claims that 'Schmitt offered the most impressive intellectual defence of Nazism ever devised'.

¹¹⁵⁰ *Supra*: Schmitt *Constitutional Theory*, 182.

were tragically neutral to threats operating within their immediate internal domain.¹¹⁵¹ How were state citizens expected to entrust their protection to a regime so manifestly incapable of preserving itself?

Doubtless Schmitt would have highlighted the impotence of the Weimar Republic in the face of threats from both communists and fascists. It was merely a matter of which of them would exploit the constitutional opportunity Article 76 represented; not a question of *whether* the constitution would fail but rather the precise moment when this would occur. Had the president acted decisively within, or beyond the scope of, Article 48 to address the incipient threat posed to the Republic; had Article 76 been suspended to oust the feasibility of the equal chance to all-comers to effect constitutional revision or annihilation, then the Nazis would have been unable to gain the political premium of power by 'legal means'. As implicitly championed by the liberal *Rechtsstaat*, legal positivism was, at least, partially responsible for facilitating the collapse of the regime it was intended to support. The problem with the alternative that Schmitt advocated was that neither normative nor other form of effective control was available to fetter executive discretion. Had the president elected to suspend or abrogate the constitution with the specific objective of admitting the Nazis (or indeed any other faction) to permanent power, would not this have produced an outcome identical to that for which Schmitt sought to upbraid liberal-positivists?

'One of the ironies of the post war debate on constitutionalism and legal theory is that decisionism and positivism were widely held to have facilitated the rise of the Third Reich. Schmitt and Kelsen became culprits in a jurisprudential morality play. Positivism was blamed for having left German jurists defenceless vis a vis a regime that could claim "law is law" even for criminal acts.'¹¹⁵²

Whatever flaws lurk within the respective position of these two positions; however cogent each may be, it is clear that the downfall of Weimar by no means signifies the end of Schmitt's polemic against positivist-orientated liberalism. With their ill-conceived conflation of legitimacy and formalistic legality, how do legal positivists determine which of two ostensibly valid statutory legal norms shall prevail? How is a supra-normative decision feasible where the legal order recognises nothing but the

¹¹⁵¹ The stance Schmitt adopts towards international law and his polemic against liberal appropriation of universalistic values are explored *infra*: Chapter 5.

¹¹⁵² *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003), 70.

norm? Does not this underscore the imperative for a sovereign decision; the exercise of non-normatively regulated discretion to resolve the impasse that positivists inexorably face and seemingly cannot resolve? To the decisionistically-minded Schmitt, this exercise of supreme and autonomous power is indispensable. Is Schmitt, therefore, disposed to concede the legitimacy of the *ad hoc* decision-making to which positivists must intermittently seek recourse to deal with the collision *they* engender – a situation arguably compounded where either or both of two conflicting ‘norms’ have retrospective effect? If not, why this repudiation of a putatively sovereign act that he ought perhaps to deem empirically inevitable, if not always normatively desirable? And what alternative solution does he advocate to address the conundrum that *ex post facto* criminalisation presents? Does the answer lie embedded within the decisionist framework that the Weimar Schmitt has laboriously crafted as a rejoinder to the value neutrality of Kelsenian normativism? Or is it within a still undiscovered theoretical domain that the remedy resides?

Transposed to the Nuremberg context, how will legal positivists – and, more crucially, Schmitt himself - address the novel dilemma: what ‘law’ ought a would-be perpetrator to obey when confronted with a potential conflict between the valid positive law of his *domestic* jurisdiction extant at the date of commission and the equally valid – but as yet hypothetical - positive *international* law that may have been enacted by the date of trial?¹¹⁵³ Who decides whether he is a traitor or model citizen for flouting or adhering to the one; a villain or a hero for violating or upholding the not-yet formulated other? And if this enigma does evoke a decision, is it conducive to the attainment of Schmitt’s perception of legitimacy or, in contrast, its fatal antithesis?

Evident at this stage is that with a provenance that has, by 1933, already outlived its utility – at least within the intrastate context - liberalism and all it connotes comprises, for Schmitt, a legal-constitutional system without a future. One marooned in the historical relativity of the Rule of Law and the arid formality this engenders. Is the moment, therefore, at hand to unearth the jewels of an anti-liberal past – of a bygone age that existed *before* emergence of the panoply of troublesome deficits endemic within liberalism - to lay the foundation for an anti-liberal future?¹¹⁵⁴ Whether or not the

¹¹⁵³ See *supra*: Chapter 2 and *infra*: Chapter 5.

¹¹⁵⁴ *Supra*: Holmes *The Anatomy of Antiliberalism*, 60.

mid to late 1930s witnesses Schmitt's formulation of a theoretical alternative, more immanently palatable than either the value-neutral positivism he appears to despise or the decisionism, likewise demonstrably unequal to the task of stabilising the Republic in its final crisis, is the focus of the next chapter.¹¹⁵⁵

¹¹⁵⁵ See *infra*: Chapter 4 for an account of Schmitt's concrete-order thinking.